(25,969)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 510.

THE CITY OF RICHMOND, PETITIONER,

vs.

ELIZABETH W. BIRD, LOULIE W. NOLTING, AND CHARLES E. WHITLOCK.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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a UNITED STATES OF AMERICA, *ss:*

At a United States Circuit Court of Appeals for the Fourth Circuit, Begun and Held at the Court House, in the City of Richmond, on the First Tuesday in February, Being the Sixth Day of the Same Month, in the Year of Our Lord One Thousand Nine Hundred and Seventeen.

Present: Hon. J. C. Pritchard, Circuit Judge; Hon. Martin A. Knapp, Circuit Judge; Hon. Charles A. Woods, Circuit Judge.

Among other were the following proceedings, to-wit:

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK, Petitioners,

versus

CITY OF RICHMOND, Respondent.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Richmond. In Bankruptcy.

1 *Petition to Superintend and Revise, etc.*

Filed June 23, 1916.

United States Circuit Court of Appeals, Fourth Circuit.

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK, Petitioners,

vs.

CITY OF RICHMOND, Respondent.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Richmond. In Bankruptcy.

To the Honorable the Judges of the Circuit Court of Appeals of the Fourth Circuit of the United States:

(1) The petition of Elizabeth W. Bird, of the Kingdom of England, Loulie W. Nolting, of the County of Albemarle, Virginia, and Charles E. Whitlock, of the City of Richmond, Virginia, respectfully shows unto your honors that they are the owners in fee simple of the certain lot of land in the City of Richmond, with the improvements thereon, known as Nos. 8, 10, 12 South 8th

Street, which said property was, on November 1st, 1909, and for several years prior thereto, in the occupancy as tenant of the Ainslie Carriage Company, the bankrupt herein, which was a corporation chartered under the laws of the State of Virginia, at an annual rental of two thousand dollars.

(2) That on the said first day of November, 1909, the said Ainslie Carriage Company, being in arrears of rent, your petitioners caused a distress warrant for rent to be levied upon the goods and chattels of said company then upon the leased premises
2 for the sum of twenty-nine hundred and twenty-nine and 57/100 dollars, that being the amount of said rent then due and payable to your petitioners.

(3) That before sale could be made under said distress warrant, the Chancery Court of the City of Richmond, through its receiver, took charge of all the assets of said Ainslie Carriage Company and proceeded to administer the same until the adjudication in bankruptcy next below mentioned.

(4) That the said Ainslie Carriage Company was duly adjudicated a bankrupt by the District Court of the United States for the Eastern District of Virginia on the 3rd day of February, 1910.

(5) That your petitioners asserted their lien for rent and proved their claim before the referee on the 20th day of May, 1910.

(6) That about the same time the City of Richmond proved its claim for delinquent taxes on personalty for the years 1907, 1908 and 1909, and its claim for current taxes for the year 1910, amounting in the aggregate to about six hundred dollars, for none of which taxes, however, did the said city exercise its right to distrain which was conferred upon it by section 72 of its charter.

(7) That during the progress of the cause there was an agreement of counsel that a sum sufficient to pay the city's claim in full should be retained in bank to await the determination of the question of priority between petitioners and said city and that the balance of the fund should be distributed. That accordingly an order was entered on the 14th day of July, 1910, paying the costs of administration and paying to petitioners one year's rent and interest, amounting to the sum of two thousand and ninety-five dollars.

(8) That the referee in his report filed March 12th, 1913, decided that the city's claim for delinquent taxes was prior in right to your petitioners' lien for rent, to which report your petitioners filed exceptions on the 21st day of March, 1913.

3 (9) That on the 14th day of April, 1914, the said District Court, treating your petitioners' said exceptions as a petition to review the report of the referee, entered an order reversing the referee's decision and declaring the lien of petitioners to be superior to the claim of the city. That on the 23rd day of April, 1914, another order was entered granting a rehearing to the city and suspending the operation of said order of April 14th, 1914. And that, on the 19th day of June, 1916, another order was entered overruling the exceptions of your petitioners, sustaining and confirming the report of the referee, declaring the claim of the city for taxes to be superior to the lien of petitioners, and entering a

judgment against them for the sum of one hundred and twenty-seven and 83/100 dollars, being the sum necessary to add to the fund in bank to make up the amount of six hundred and ninety-four and 63/100 dollars, principal and interest, ascertained to be due to said city, such deficit having been caused by the payment on account to petitioners by the said order of July 14th, 1910.

Wherefore, your petitioners, feeling aggrieved because of the order of June 19th, 1916, declaring that the unsecured claim of the City of Richmond for delinquent personal taxes is superior to their lien for rent under their distress warrant aforesaid, ask that said order may be revised, in matter of law, by your honorable court, as provided in section 24-*b* of the Bankruptcy Law of 1898, and the rules and practice in such case provided.

ELIZABETH W. BIRD,
LOULIE W. NOLTING,
CHARLES E. WHITLOCK,
Petitioners.

JAMES E. CANNON,
Attorney for Petitioners.

STATE OF VIRGINIA,
City of Richmond, To-wit:

I, James R. Gordon, do hereby make solemn oath that I am the duly constituted agent and attorney in fact of the petitioners, Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock, mentioned in the petition hereto attached, and that the state-
4 ment of facts therein contained is true to the best of my knowledge, information and belief.

JAS. R. GORDON.

Subscribed and sworn to before me, a notary public of the State of Virginia, in and for the City of Richmond, this 23rd day of June, in the year nineteen hundred and sixteen.

GRACE L. MILLER.

My commission expires Sept. 14, 1918.

Notice to Respondent to Demur, Answer, or Move to Dismiss.

Issued June 26, 1916.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1461.

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK, Petitioners,

vs.

CITY OF RICHMOND, Respondent.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Richmond. In Bankruptcy.

To City of Richmond, respondent:

Take Notice:

That you are required to demur, answer or move to dismiss the foregoing petition to superintend and revise, filed in this office in the above entitled cause on June 23, 1916, within fifteen days from this date, as required by Rule 36 of this court.

June 26, 1916.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit.
By CLAUDE M. DEAN,
Deputy Clerk.

5 *Memorandum.*

A certified copy of the petition to superintend and revise, together with the original of the above notice annexed, were mailed to H. R. Pollard, Richmond, Va., counsel for the respondent, on June 26, 1916.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit,
By CLAUDE M. DEAN,
Deputy Clerk.

Answer of Respondent.

Filed July 8, 1916.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1461.

ELIZABETH W. BIRD, LULIE W. NOLTING, and CHAS. E. WHITLOCK, Petitioners,

vs.

CITY OF RICHMOND, Respondent.

Answer of the City of Richmond to the Petition Filed Herein on June 23, 1916, and Served on the Respondent June 26, 1916.

To the Honorable Judges of the Circuit Court of Appeals for the Fourth Circuit of the United States:

The City of Richmond, a municipal corporation, for answer to the petition exhibited herein against it, responds as follows:

1. The respondent says that the said petition should be dismissed upon the ground that the order complained of entered by the United States District Court for the Eastern District of Virginia on the 19th day of June, 1916, is not such an order as is contemplated by section 24 (*b*) of the Bankrupt Act, authorizing this honorable court to superintend and revise in the matter of
6 law the proceedings of the said District Court in bankruptcy, and is such an order as is contemplated by section 25 (*a*) subdivision 3 of the said Bankrupt Act, which requires that an appeal be taken within ten days after the judgment has been rendered.

2. This respondent further says that its charter and ordinances herein mentioned and the State statutes referred to make it manifest that the said order of the District Court was right and should be affirmed, and it prays that the said charter and ordinances, which are now here offered in evidence, may be treated by this court as a part of the record for all the purposes of this case. Respondent says that by sections 47, 48 and 49 of its charter it is provided that there should be a collector of the city taxes, who is charged with the duty of collecting all taxes and assessments levied by the city, and who is authorized to perform such other duties as may be prescribed by the charter or ordained by the City Council. It is also provided by section 51 of the said charter that the said collector shall turn over to the auditor of the city on the first day of February in each year all delinquent tax accounts for the preceding year, and it is made the duty of the Auditor to deliver the same to an officer known as the Collector of delinquent Taxes, who is required to perform such duties as may be prescribed by the Council, and who is vested with the same power to collect and by

the same means and processes all bills delivered to him as are conferred by the charter upon the Collector of Taxes. The Council is authorized by section 72 of the charter to vest the Collector of City Taxes with any or all of the powers now or hereafter vested in a sheriff as collector of State taxes and may prescribe the mode of his proceeding. The said charter was enacted by the General Assembly of Virginia and approved May 24, 1870, at which time the sheriffs of the Commonwealth were charged with the duty of collecting State taxes, a duty which has since been transferred to the treasurers of the various counties. By section 73 of the charter the legislature declared that:

"All goods and chattels wheresoever found may be distrained and sold for taxes assessed and due thereon, and no deed of trust or mortgage upon goods or chattels shall prevent the same
7 from being distrained and sold for taxes assessed against the grantor in such deed while such goods and chattels remain in the grantor's possession, nor shall any such deed prevent the goods and chattels conveyed from being distrained and sold for taxes assessed thereon, no matter in whose possession they may be found."

By section 74 of the charter it was provided that:

"Any payment of taxes made by the tenant, unless under an express contract contained in his lease, shall be a credit against the person to whom he owes the rent, and where any tax is paid by a fiduciary on the interest or profit of moneys of an estate invested under an order of the court, or otherwise, the tax shall be refunded out of such estate."

Respondent says that by these provisions of the State statutes all goods and chattels of a citizen wheresoever found were subjected to an inchoate lien for taxes assessed against the citizen, and that in case of a tenancy the landlord's right to rent was expressly subordinated to the city's claim for taxes and that this is the case also under the general statutes of the State. Pursuant to these provisions *of* chapter 14 of Richmond City Code 1899 was ordained by the Council. This chapter of the City Code, and especially sections 6, 7, 8, 9, 10, 11, 12, 13, 14, 17, 20 and 22, put into force the charter provisions above mentioned and are in all respects identical with the same sections of chapter 16, Richmond City Code 1910, except for some amendments which are immaterial. The fiscal year of the city begins on February 1st of each year in accordance with chapter 13, section 8, of the City Code, and under the provisions of the ordinances mentioned, the taxes are assessed and bills delivered to the Collector of City Taxes, who advertises that they are in his hands for collection annually for fifteen days prior to the 15th day of June in each year. Unless one-half of the taxes be paid before the 30th day of June, a penalty of 5 per cent is added to the amount charged. In like manner notice is given prior to the 15th day of December, and unless all taxes are paid on or before the 31st day of December a like penalty is added. All goods and chattels in the city belonging to persons assessed with taxes are made

8 liable to distress by section 8, and it is provided by section 7 that if all taxes be not paid before the first day of September, the collector shall distrain except where one-half has been paid prior to June 30th. It is also provided by section 11 that any person indebted to or having in his hands the estate of a party assessed with taxes may be required to pay said taxes out of the same, either in whole or in part, and shall be entitled to a charge or credit for so much on account of such debt or estate against the party assessed. Such persons may be summoned to court, if necessary, and from the time of the service of any such summons the taxes are made a lien on the debt due from such person or on the estate in his hands. If a person assessed with taxes in removing his property out of the city or intends to sell out or close out his business, the collector may, under section 20, distrain for such taxes, although the first day of September has not arrived, and although one-half has been paid. And, finally, the provisions of charter, section 73, above mentioned are expressly ordained. Under these ordinances the collector turns over to the Auditor all uncollected bills on the first day of February of each succeeding year, and the Auditor delivers them to the Collector of Delinquent Taxes, who is in express terms vested with the same power of collection and by the same means and processes as are authorized to the collector. The tax bills then become delinquent on February 1st of the year following the assessment and remain in the hands of the Delinquent Tax Collector until July 1st of the year following their delivery to him. Thus the tax of 1907 was payable on or before the 30th of June of that year, or with the penalty of 5 per cent added on or before the 31st of December, 1907. All goods and chattels of the taxpayer were subject to distress and could have been distrained at any time after February 1, 1907, if the emergency required, and at any time after September 1, 1907, in all cases. The tax became delinquent on the first day of February, 1908 and remained in the hands of the Collector of Delinquent Taxes until July 1, 1909, the goods and chattels of the taxpayer being liable to distress for the tax of 1907 in the meantime. Thereafter, the tax bill for 1907 was delivered to the Auditor, in whose custody it remained until paid or otherwise disposed of by proper authority, but the goods and chattels of the taxpayer, if any, still remained

9 liable to distress for the amount due. It will be observed that section 73 of the charter contains no time limit for distress. The inchoate lien for personal taxes thus given is in this particular identical with the lien for real estate taxes given by section 75 of the charter, which simply gives the lien without a time limit, and this section was held by the Supreme Court of Appeals of Virginia to give a perpetual lien in the case of Powell's Executor vs. Richmond, 94 Va. 80, thus affirming the principle that where a lien is perpetual by statute or is intended to continue until taxes are paid, no statute of limitations or delay in enforcement can be invoked against proceedings to enforce the lien. Or, in other words, nullum tempus occurrit regi. This principle is affirmed in Cooley on Taxation, 2nd Edition, page 448, 37 Cyc. 1147, 28 Cyc. 304 and 3rd Dillon Municipal corporations, section 1194, p. 1902. It fol-

lows, therefore, that when the landlord distrained on November 1st, 1909, for the year and a half rent due, for the lease was from April to April, at the rate of $2,000.00, the goods and chattels levied on by him were subject to the inchoate lien of the city for $169.00, the balance of the taxes of 1907 due by his tenant. They were also liable to the lien of the city for $294.00, the taxes of 1908, which were not paid and still in the hands of the Collector of Delinquent Taxes for collection by distress. They were likewise subject to the same lien for $294.00, the taxes for 1909, which were current taxes, and had not even become delinquent, but were still in the hands of the Collector of Taxes, to whom under the ordinances the tenant might pay the same on or before December 31, 1909. The taxes for 1910, $37.63, had not even been assessed on November 1, 1909, when the distress was levied by the landlord, and are taxes payable by the court on property in its hands. It will be observed a petition was filed in the Chancery Court of the City of Richmond for the appointment of receivers on November 3, 1909, and receivers were appointed on November 4, 1909. It is true a petition in involuntary bankruptcy was filed on November 6, 1909, followed by an order of adjudication on February 3, 1910, but the property was none the less in the hands of the receiver of the Chancery Court at the time it became liable for the taxes of 1910, on February 1st of that year, and came into the receiver's possession on November 4, at a time when the taxes of 1909 were current taxes, and the taxpayers still had until December 31, 1909, within which to pay them. As already stated, the taxes for 1908 were still in the hands of the Collector of Delinquent Taxes and along with the taxes for 1907 were collectible by distress. Of course, the appointment of the receivers on November 4, 1909, prevented the city and collector from levying the distress warrant, but under the decisions in this circuit the inchoate lien arising out of the liability to distress must be treated as a valid and perfect lien without actual levy. That the property was subject to taxation is plain from V. C. sections 491, 492 and 493, and by the express mandate of the statute, section 492 (*b*), Acts 1897-8, page 825, every court in the Commonwealth was forbidden to enter any order or decree directing the payment or distribution of funds or property under its control or under the control or in the hands of any receiver or officer of the court until all taxes and levies upon such property were paid, without providing for such payment, and all officers are forbidden to pay out any such funds unless a receipt for the taxes showing that they were paid was produced before him. It thus appears, we think, that the city was given an unlimited inchoate lien for its taxes on the goods and chattels of the bankrupt. The lien thus given by the specific charter provisions mentioned is also given by section 622, et sequa, of the Code. That section provides that any goods or chattels of the person in the city may be distrained by the collector, and that in all cases property subject to distress shall be liable in the hands of any person. This being so, it is of great importance to note that section 2791 of the Code, prescribing what goods may be levied upon for rent by distress, is expressly controlled

by the last provision of section 2792, which declares that the power of distress thus given shall not affect any lien for taxes. It thus appears that the landlord's right to distrain is qualified by the provision that he shall distrain subject to the lien of the city and state for taxes, levies or military fines. As a consequence, it follows that the landlord in this case could not by a levy supplant the inchoate lien of the city for its taxes. It is incontrovertible, and indeed was admitted, that the taxes for 1910 should be paid in preference to the landlord. This cannot be so unless the landlord's lien is subordinate to the rights of the city and state. It was not admitted, but we think it must be admitted, that the taxes for 1909, which
11 were the taxes of the current year at the time of the levy by the landlord and of the receivership, must also be paid in preference to the landlord, and since his right of distress by express statute cannot affect any lien for taxes or levies, it follows that his levy was subject to the prior rights of the city and state for 1907 and 1908. It is certain that the receivership of November 4, 1909, and the bankruptcy of November 6, 1909, and February 3, 1910, prevented a levy for the taxes, and it is equally certain that the goods and chattels were subject to levy, though as stated, no levy was necessary because of the receivership and of the custody of the court.

3. The District Court ordered a sale on March 22, 1910, and on April 29, 1910, confirmed the report and account of sales whereby a total of $3,343.02 was realized. Of this there has been paid on account of attorney's fees, costs, etc., $674.67, and to the petitioners on account of rent the sum of $2,095.00, while the city has received nothing on account of its taxes, notwithstanding the schedule itself reports the rent claim after the taxes and under the heading No. 4, "Other debts which have priority by law."

Apart from a question of lien under the State statutes, your respondent claims that the Bankrupt Act itself places the claims of the city and State before that of the landlord, and that the taxes due must be paid, even though there is not a lien therefor under the State statutes, and although there is a lien under them for the rent. No State statute can override the clear provisions of the acts of Congress, and section 64 (*a*) of the Bankrupt Act must control a State statute if a conflict exists. Relying, therefore, upon the decisions of the Supreme Court of the United States in the case of New Jersey vs. Anderson, 203 U. S. 483, and of the Circuit Court of Appeals in Waco vs. Bryan, 127 Fed. 80, and Chattanooga vs. Hill, 139 Fed. 601 and other cases which will be cited, your respondent says that section 64 (*a*) of the Bankrupt Act intends to enact and does enact into law the well known principle which governs all courts in the administration of estate requiring the payment of taxes before any distribution of the funds to creditors. This principle is expressly adopted by statute in Virginia in section 492 (*b*) of the Code,
12 and it is now enacted also by Congress in section 64 (*a*) of the Bankrupt Act. If other authorities were needed your respondent would rely upon the opinion of Chief Justice Fuller in 149 U. S., p. 184, re Tyler, citing with approval Greeley vs. Providence

Savings Bank, 98 Mo. 458-60, and the opinion of Whittle, J., in Taylor vs. Sutherlin-Meade Co., 107 Va. 787. As said by Mr. Justice Day in 203 U. S. 489, supra: "The requirement of the present law is a wide departure from the Act of 1867 and specifically requires a trustee to pay all taxes legally due and owing without distinction between the United States and the State, county, district or municipality." It is because taxes are not debts and the United States, states and cities are not creditors that taxes need not be proved and that tax claimants have no voice in the selection of the trustee.

New Jersey vs. Anderson, 203 U. S.;
Lane Land Company vs. Oregon, 7 Wallace 71;
Swarts vs. Hamner, C. C. A. (8th Circuit), 56 C. C. A. 92, affirmed 194 U. S. 91.

This being so, and because this is so, since neither the United States, nor the state, nor the city have any voice in the appointment of the trustee or management of the bankrupt estate, section 64 (*a*) of the act specifies a distinct order of priority as stated in 2 Remington on Bankruptcy, page 1319, et sequa, where the learned author also says that it is incorrect to say, as is said in re Veitch, 4 A. B. R. 112, that taxes come under section 64 (*b*) (5) in the order of priority. It would be deprived of all meaning if taxes were comprehended in that section, re Stalker 10 A. B. R. 713, 123 Fed. 961. "The significance of section 64 (*a*) is that a claim of taxes is paramount to all other claims, because of the peculiar needs and requirements of the municipality. The right to such priority belongs solely to the state or municipality." 2 Remington, section 2148, page 1325. A contest then between a landlord and a city or state or the United States is not a contest between creditors, for taxes are not debts, and the city and state are not creditors. It is not a case, therefore, in which there is a race of diligence, but the city and state stand on exactly the same plane as the United States, as is directly held in New Jersey vs. Anderson, and the taxes due are paramount to all other claims, regardless of whether under the state law there is a lien for the taxes or not.

13 State vs. Rowse, 49 Mo. 586;
Re Tilden, 91 Fed. 500;
Re Weissman, 178 Fed. 115;
Swarts vs. Hamner, 194 U. S. 444;
New Jersey vs. Anderson, 203 U. S. 483;
Chattanooga vs. Hill, C. C. A., 15 A. B. R. 195;
Waco vs. Bryan, C. C. A., 127 Fed. 80, 11 A. B. R.;
Cooper Grocery Co. vs. Bryan, C. C. A., 11 A. B. R. 734.
Collier on Bankruptcyfi pp. 889-891-892-895.

For these reasons, as well as for others apparent upon the record, and which will be hereafter advanced, this respondent insists that the

petition should be dismissed and the decision of the District Court affirmed.

THE CITY OF RICHMOND,
By GEORGE AINSLIE, *Mayor.*

Teste:
J. M. PACE, *Treasurer.*

[SEAL.] GEORGE WAYNE ANDERSON,
Assistant City Attorney and
Solicitor for the Respondent.

STATE OF VIRGINIA,
City of Richmond, To wit:

This day personally appeared before me, Richmond T. Lacy, a notary public in and for the city and state aforesaid, George Ainslie, Esq., who, being first duly sworn, made oath that he is the Mayor of the City of Richmond, and that the facts and things stated in the foregoing answer are true to the best of his knowledge and belief.

Given under my hand this 7th day of July, 1916.

My commission expires on the 12th day of September, 1916.

RICHMOND T. LACY, JR.,
Notary Public.

14 TRANSCRIPT OF RECORD.

Filed Aug. 2, 1916.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

At a District Court of the United States for the Eastern District of Virginia, Begun and Held at the United States Court-room, in the Post Office Building, in the City of Richmond, Virginia, on the First Monday in the Month of April, Being the Third Day of the Same Month, in the Year of Our Lord One Thousand Nine Hundred and Sixteen.

Present: The Honorable Edmund Waddill, Jr., Judge of the District Court of the United States for the Eastern District of Virginia.

Among other were the following proceedings, to-wit:

In the Matter of AINSLIE CARRIAGE COMPANY, Bankrupt.

In Bankruptcy.

Report of Referee, Dated July 13th, 1910.

Filed July 14th, 1910.

To the Honorable Edmund Waddill, Jr., Judge:

The undersigned, your referee in bankruptcy, for the Third Division of said district, to whom the above-entitled matter was referred, begs to report:

That from the trustee's report, filed July 12th, 1910, it appears that he has collected most of the accounts due the bankrupt's estate, and, it further appears from said report that he has collected from this source $1,832.08, and of this amount has disbursed $1,068.71, leaving a balance of the money derived from this source of $763.37;

That he has deposited $750.00 of this balance in bank to
15 the credit of court, in this matter, retaining $13.37 to cover small current expenses incident to closing up the estate;

That it also appears from the record in this matter that the net amount realized from the sales of property was $2,432.25, making a total amount now in bank to the credit of court of $3,182.25;

That it further appears from said report that said trustee has collected most of the accounts due the estate, it appearing that $400.00 is about all that he thinks can be realized from such accounts as he still has in his hands;

That such being the case, your referee recommends that the fund now in bank be distributed to those entitled thereto;

Your referee further begs to report that the claims for taxes and rent which have been filed herein amount to $4,517.10; exclusive of interest, and it is, therefore, clear that the fund will not be sufficient to pay the claims in full, to say nothing of the costs and fees;

That said claims are as follows:

T. C. Walford, Collector Delinquent Taxes.....	$657.00
Commonwealth of Virginia, for Franchise Tax and Registration Fee	97.10
James R. Gordon, agent for Elizabeth W. Bird, et als., rent and interest on the amount of his claim as set forth therein	3,762.90
	$4,517.00

In regard to the rights of these creditors to participate in the distribution of this fund, your referee begs to report that he is of opinion that the claim for rent should participate first, because the record shows that the landlord had perfected a lien for $2,929.57 of the same before bankruptcy by levying a distress warrant as provided by the Code of Virginia, and the balance of $833.33 is a charge upon the estate by reason of the fact that it is rent due for the period of occupancy by the receiver of the Chancery Court and the trustee in bankruptcy; however, so far as the taxes due said Walford are concerned, it has been agreed by counsel for the landlord and the city attorney of the City of Richmond, Virginia, that the amount of this claim for taxes be held in bank pending the adjudication by
16 the Supreme Court of Appeals of this State of the question, whether the State or city has a lien for their taxes; in regard to the claim of the Commonwealth of Virginia for taxes in the way of franchise tax and registration fees, your referee begs to report that the question of whether such charges are covered by section 64 of the Bankrupt Act has been decided by the Supreme Court of the United States in favor of the State, but unless the State has a lien for such

taxes, the landlord's claim for rent should be paid first, because he has perfected his lien. Your receiver would recommend, therefore, that the amount of this claim be left in bank also;

Your referee further begs to report that, subject to the approval of the court, he has made the following allowances to the trustee and attorneys connected with this matter:

To O'Flaherty & Fulton and Stern & Stern, counsel for petitioning creditors	$150.00
To Cutchins & Cutchins, counsel for bankrupt	100.00
To John Howard, counsel for trustee	150.00
To John P. Lea, trustee	127.84
	$527.84

And the costs due the clerk of this court and your referee are as follows:

Joseph P. Brady, clerk	$8.20
Thomas B. Snead, referee, for mailing and publishing notice first meeting of creditors, for filing 48 proofs of claims and one per cent on money distributed to creditors	54.83
	$63.03

making a total of costs and fees of $590.87.

Your referee begs to report further that counsel for the landlord contends that the fund in this matter should be so marshalled as to allow the said amount of $750.00, which was realized from the collection of accounts, to be paid as a credit upon the landlord's claim of $833.33 against the receiver of the Chancery Court and
17 the trustee herein, and since said amount was a part of the actual and necessary cost of preserving the estate, your referee is of opinion that under section 64-*b* (1) of the Bankrupt Act said amount of $750.00 should be so applied;

That after deducting the total amount of the two claims for taxes which should be left in bank for the present, and paying cost and such compensation to counsel in this matter as the court shall allow, and the trustee's commissions, the balance of the fund in bank should be applied upon the lien for rent of J. R. Gordon, agent for Elizabeth W. Bird, et als.;

Your referee also begs to call attention to the fact that the costs incident to the receivership in the Chancery Court have been paid;

All of which is respectfully submitted for review by the District Judge.

THOS. B. SNEAD,
Referee in Bankruptcy.

Dated at Richmond, Va., July 13th, 1910.

Order Paying Rent, Attorney's Fees, Costs, Etc.

Entered and Filed July 14th, 1910.

On motion of John P. Lea, trustee, his report dated July 11th, 1910, is hereby filed and also the report of Thomas B. Snead, referee in bankruptcy in this case, dated July 13th, 1910, and there being no exceptions to the report of John P. Lea, trustee, the same is hereby approved and confirmed; and the creditors this day having appeared in court and filed an exception in writing to the report of the said Thomas B. Snead, referee, because it allows more than one year's rent to Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock for rent on the premises occupied by said bankrupt company, known as Nos. 8, 10, 12 South Eighth Street, in the City of Richmond, Virginia; and the court now, without passing upon said exception and allowing the claim of the said Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock for one year's rent at this time, with interest thereon to date, proceeding to award counsel fees, commissions to the trustee in bankruptcy herein and costs,

doth adjudge, order and decree that Joseph P. Brady, clerk
18 of this court, do check on the fund in the Planters National Bank to the credit of the court in this cause in favor of the following named persons for the amounts set opposite their several respective names, viz:

Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock or James E. Cannon, their attorney.....	$2,095.00
O'Flaherty & Fulton, amount advanced by them as filing fees	30.00
O'Flaherty & Fulton and Stern & Stern, attorneys for petitioning creditors	150.00
Cutchins & Cutchins, attorneys for bankrupt	100.00
John Howard, attorney for trustee	150.00
John P. Lea, trustee, as commissions	127.84
Joseph P. Brady, clerk	8.20
Thomas B. Snead, referee, his fee for notices of meeting of creditors and filing proofs of claims.....	54.83

All of said checks to be countersigned by Thomas B. Snead, referee in bankruptcy.

And the court doth declare that the said sum of $2,095.00, rent as aforesaid, shall be charged upon the assets of the bankrupt company in the following proportion, namely: $873.33 upon the proceeds of the book accounts, $1,221.67 upon the proceeds of the tangible personal property, but in apportioning the rent herein it is done without prejudice in any way to the rights of the creditors.

EDMUND WADDILL, JR.,
United States District Judge.

Richmond, Va., July 14th, 1910.

Referee's Report Upon Claim for Rent and Taxes.

Filed March 12th, 1913.

The undersigned, your referee in bankruptcy, for the Third Division of said district, to whom the above-entitled matter was referred, begs to report as follows:

That, as will appear from his report, dated and filed July 14th, 1910, by agreement of counsel for the landlords in this matter, and the city attorney of the City of Richmond, the question of whether the landlords who claim to have a lien upon certain of the bankrupt's property, or the State of Virginia and the City of Richmond should participate first in the distribution of the bankrupt's estate, was left open for determination, pending the adjudication by the Supreme Court of Appeals of Virginia in a certain suit then pending therein of the question, whether the State or city had a lien for their taxes, which case, when decided, it was hoped would be a guide in determining the questions involved in this controversy. Since that time, however, this case has been disposed of by the Supreme Court of Appeals, upon a question of jurisdiction and without touching upon the questions in issue here, and your referee is now requested by counsel for all parties to this controversy to report his findings upon the same to the court; and, accordingly, your referee further begs to report to the court his conclusions of fact and law upon the questions here involved, and the same are as follows:

The facts are that on Nov. 1, 1909, and within four months preceding the date of adjudication of bankruptcy in this matter, said adjudication having taken place on the 3rd day of February, 1910, the landlords levied a distress warrant upon certain of the bankrupt's property for rent, amounting to $2,929.57, and on the same day levied an attachment for rent upon certain of the bankrupt's property for the further sum of $833.33, and following bankruptcy, they proved their claim in this matter for the above mentioned amounts claimed to be due them for rent, and set forth in their proof of claim that, by virtue of said distress warrant and attachment proceedings, they possessed a good and sufficient lien for their rent, and that during the course of this proceeding the State of Virginia filed their claims for taxes in the sums of $97.10 and $657.00, respectively, claiming that they were entitled to be paid their taxes in advance of the payment of the claims of any creditors, and asserting that the liens claimed by the landlords having been obtained within four months before bankruptcy, were discharged by virtue of section 67-*f* of the Bankruptcy Act;

And the question for determination here is whether, by virtue of the liens obtained through said distress warrant and attachment proceedings, the landlords have a claim for rent which is superior to the claims of the State of Virginia and City of Richmond for taxes, and, upon a second and careful consideration of the matter, your referee is of the opinion that the landlords' claim

is not superior to those of the State of Virginia and the City of Richmond for taxes;

When this matter was first brought to your referee's attention he was of the opinion that the landlords were entitled to participate in the distribution of the bankrupt's estate before the State of Virginia and the City of Richmond for their taxes, and so expressed himself in his said report of July 14th, 1910, but, upon a second consideration of the matter, he has found it necessary to change his opinion;

So far as the liens obtained through the distress warrant and attachment proceedings are concerned, it seems only necessary to say that the same are void under and by virtue of section 67-*f* of the Bankrupt Act, which provides that "all levies, judgments, attachments or other lines, obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt, and the property affected by the levy, judgment, attachment or other lien shall be deemed wholly discharged and released from the same, and shall pass to the trustee as a part of the estate of the bankrupt, unless the court shall, on due notice, order that the right under such levy, judgment, attachment or other lien shall be preserved for the benefit of the estate." In this connection see also Westside Paper Co., 20 Am. B. R. 289; in re Dougherty, 109 Fed. 480, and in re Consumers Coffee Co., 18 Am. B. R. 500. This being the case, it follows then that by virtue of section 64 of the Bankrupt Act, the State of Virginia and the City of Richmond are entitled to participate in the distribution of the bankrupt's estate for their taxes ahead of the landlords for their rent; rent, under this section of the act, being relegated to the fifth subdivision of the same;

For the further information of the court, your referee submits herewith a recapitulation of the total amount realized from all sources by the trustee, how so much of the same as has been disbursed has been disposed of, and the balance now in bank:

21 *Recapitulation.*

To total amount realized by trustee from all sources.... $3,343.02

By Disbursements made under order of court, as follows:

July 14th, 1910.

To Elizabeth W. Bird, Loulie W. Nolting and Chas. E. Whitlock, upon account of their claim for rent	$2,095.00	
Brought forward	2,095.00	3,343.02
To O'Flaherty & Fulton, Attys., filing fees advanced by them	30.00	
To O'Flaherty & Fulton and Stern & Stern, Attys., for petitioning creditors	150.00	
To Cutchins & Cutchins, attys., counsel for bankrupt	100.00	
To Jno. Howard, counsel for the trustee	150.00	
To Jno. P. Lea, trustee, commissions as such	127.84	
To Joseph P. Brady, clerk, costs	8.20	
To Thos. B. Snead, referee, costs	54.83	

June 30, 1911.

To Jno. Howard, counsel for trustee	50.00	
To Jno. P. Lea, trustee, additional commissions allowed him as such	3.80	
		2,769.67
Balance in bank		$573.35

And said balance, after paying balance of costs due and unpaid, should be applied, first, to the liquidation in full of the claim of the State of Virginia for taxes, and the balance then remaining as a credit upon the claim of the City of Richmond for taxes;

Your referee further begs to report that he knows of no further costs still due in this matter, except an item of $1.50 due Miss M. Heeke for services in taking depositions;

22 All of which is respectfully submitted for review by the District Court.

THOS. B. SNEAD,
Referee in Bankruptcy.

Dated at Richmond, Va., March 12th, 1913.

Exceptions of Elizabeth W. Bird and Others to Referee's Report.

Filed March 21st, 1913.

The said Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock except to the said report of Referee Snead, dated March 12th, 1913, because it gives to the State of Virginia and to the City of Richmond a lien upon the fund under the control of the court prior to the lien of said exceptants as landlords of said bankrupt.

ELIZABETH W. BIRD,
LOULIE W. NOLTING,
CHARLES E. WHITLOCK,
By JAMES E. CANNON, *Counsel.*

Order Reversing Ruling of Referee and Establishing Claim of Landlords for Rent.

Entered and filed April 14th, 1914.

On consideration of the report of Referee Thomas B. Snead, dated and filed on the 12th day of March, 1913, and of the exceptions thereto of Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock, filed on the 21st day of March, 1913, (which said exceptions are treated as a petition to review the said report), the court, having maturely considered the arguments of counsel, is of the opinion, for reasons stated in writing and filed with the record, that the lien of the said Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock, for rent, is superior to the claims of the State of Virginia and the City of Richmond, respectively, for delinquent taxes assessed against the goods and chattels of the Ainslie Carriage Company, bankrupt, and the court doth accordingly reverse the ruling of the referee, as set forth in his report aforesaid, and
23 doth adjudge, order and decree that the said landlords, by virtue of their lien for rent aforesaid, are entitled to the fund to the credit of the court arising from the sale of the goods and chattels of the said bankrupt, subject to the payment of costs in this cause now remaining unpaid.

And the court doth accordingly order that Joseph P. Brady, clerk of this court, do draw his checks upon the fund on deposit in the Planters National Bank to the credit of the court in this cause (said checks to be countersigned by Thomas B. Snead, referee) in favor of the following named persons for the amounts set opposite to their names, respectively, as follows:

Miss M. Heeke, in full of services for taking depositions	$1.50
Clarence J. Smithers, United States marshal, in full for services of said marshal	4.00
Joseph P. Brady, clerk, in full for his services herein	1.05

Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock, or James E. Cannon, their attorney, on account of their claim for rent..... 566.80

Making a total of..... $573.35

EDMUND WADDILL, Jr.,
U. S. District Judge.

Richmond, Va., April 14th, 1914.

Petition of City of Richmond for Rehearing.

Filed April 23rd, 1914.

To the Hon. Edmund Waddill, Jr., Judge:

Your petitioner, the City of Richmond, by its attorney, respectfully prays that the decree entered herein on the 14th day of April, 1914, denying the claims of the City of Richmond and State of Virginia, to priority of payment of the arrears of taxes due them, respectively, over the claims of the defendants as landlords for rent due by the bankrupt, be set aside and that a rehearing be
24 granted to your petitioner of the several points involved in this controversy, upon the following grounds:

1st. That by reason of fortuitous circumstances, your petitioner had no opportunity to see or reply to the brief filed on behalf of the defendants in this case, although no blame is imputed to them on that account, but in view of the importance of the question involved to the City of Richmond, it is respectfully urged that a full argument of the questions involved ought to be had.

2nd. The decree seems to be predicated upon the proposition that the city is without a lien for its taxes, whereas chapter 16, section 10 of Richmond City Code, 1910, expressly grants a lien on and after the first day of February of the year in which said taxes are assessed.

3rd. An investigation of the records in the case of Jackson Coal Co. v. Phillips, 114 Va. 40-50, has disclosed the fact that the City of Petersburg was not represented in argument and did not file a brief in the cause, but it is submitted that even though this case may rightly decide the rights of Petersburg under its charter and ordinances, that it has no necessary bearing upon the rights of the City of Richmond under its peculiar charter and ordinances. This case was relied upon by the defendants and is cited in the decree, as was also the case of Marye v. Diggs, 98 Va. 748. This latter case related exclusively to taxes on real estate and not upon personalty, as in the case at bar, and was decided December 6th, 1900. In response to it the General Assembly of Virginia on the 14th day of February, 1901, amended section 456 of the Code of Virginia so as to overthrow the decision in Marye v. Diggs, and to authorize the suit in equity to enforce a tax lien which that decision denied.

Many decisions may be cited of the Federal courts and citations made from text writers to the effect that the Bankrupt Act itself places the claim for taxes of the United States and of a State and municipality above lien creditors, and the decision in N. J. v. Anderson, 203 U. S. 483, expressly holds that a lien is not necessary to give the State or municipality the priority awarded to it by the Bankrupt Act.

In view of the wide importance and far-reaching consequences of the decree mentioned and for the reasons above set forth as well as for others which might be given, your petitioner respectfully prays that the decree may be set aside and a rehearing be granted o it upon the questions involved in this controversy.

Respectfully submitted,

CITY OF RICHMOND,
By COUNSEL.

GEO. WAYNE ANDERSON,
Assistant City Attorney.

Order Granting Rehearing.

Entered and Filed April 23rd, 1914.

Came this day the City of Richmond, by its attorney, and by leave of court filed its petition asking that the decree entered herein on April 14, 1914, be set aside and that a rehearing be granted on the several matters involved in this cause. And thereupon this cause came on to be heard upon the said petition and was argued by counsel. On consideration whereof, the court being of opinion that the prayer of the said petition should be granted, it is adjudged ordered and decreed that the said decree of this court in this cause entered on the 14th day of April, 1914, be set aside for the present and that a rehearing of the several matters and things involved therein be granted to the City of Richmond. Whereupon, this cause is continued generally for the purpose of such rehearing.

EDMUND WADDILL, JR.

Richmond, Va., April 23rd, 1914.

Conclusions of the Court.

Filed April 21st, 1916.

WADDILL, *District Judge:*

The question presented on the application for rehearing is as to the priority of delinquent taxes due by the bankrupt to the City of Richmond, over the rent claim of the landlord, who levied his distress warrant within four months of the bankruptcy, the City of Richmond not having made distraint and sale for such taxes.

Upon the rehearing, the case was argued with unusual ability by Mr. George Wayne Anderson, the assistant city attorney, and Mr. James E. Cannon, attorney for the landlord, and the question presented is one of considerable difficulty.

The conclusion of the court, after mature consideration, is that the rehearing asked for should be allowed, and the former decision, following the case of Jackson Coal & Coke Co. v. Phillips, 114 Fed. 40, 50, which gave the rent claim precedence over the city for its taxes, should not be adhered to, and that, on the contrary, the city should be decreed to have priority over the landlords' claim for the amount of its arrearages of taxes, as to which the city's right of distraint and sale existed. In the Jackson Coal & Coke Co. case supra, it was held that no lien existed for arrears of city taxes, under the ordinances of the City of Petersburg. But that seems not to be the case as to the City of Richmond, where the right of distraint and sale exists as well for delinquent as for current taxes. It was insisted with much force in behalf of the landlord's lien that the city had no express lien for its taxes in arrears; but only a right of distraint and sale therefor; and hence, until distraint is made that the landlord's lien for rent, where a distress warrant was issued, as here, took precedence over a claim for taxes.

This, the court thinks, in the administration of an estate in bankruptcy, is too narrow a view of the law. Under decisions in bankruptcy, certainly in this district, in In re Winn, Fed. Cas. 18, 117, 3 Fed. Cas. 752, 761, a decision of Chief Justice Chase, under the act of 1867, and in re Hyman, 226 Fed. 982, under the act of 1898 (both decisions from this district) it is held that it is not necessary to sue out a distress warrant to protect the landlord's lien for the current year's rent, but the court will recognize such claim, whether the distress warrant was sued out or not; and it follows that taxes for which a lien is given by statute, upon making distraint therefor, should be treated in like manner. To deny to the City of Richmond a lien of priority for arrears of taxes, where the right of distraint and sale existed, because its officials had failed to make
27 distraint, would be to place the sovereignty in a less favorable position than the landlord, who held a like inchoate right of lien for his rent. And this becomes the more apparent when the landlord's lien for the current year's rent upon property found on his premises, or removed therefrom, not more than thirty days, is expressly made "subject to the prior lien for taxes, levies or militia fines." Under the decisions of this court, supra, no advantage is gained by the *land* by the issuance of the distress warrant, but his rights are respected and enforced by reason of the statutory lien recognized under the local decisions. He can, it is true, sue out a distress warrant; but, as in this case, the same having issued within four months of the bankruptcy, would fail, save by reason of the inchoate lien upon which it was founded; and a like right should be recognized in favor of the city for arrearages of taxes due to it, as to which a right of distraint existed and had not been exercised.

The court is not unmindful of the fact that the landlord's

right by virtue of his inchoate lien, is recognized, in absence of distraint, for only the current year's rent; whereas, there is no limitation apparently upon the city's right of distraint for its past and present taxes. This unlimited right of distress on the part of the city may, in some cases, work hardship; and the court does not mean to say that in the administration of a bankrupt's estate, it would not be proper in its discretion to place a reasonable limitation upon the time in which the city's right should be enforced, as respects such arrears of taxes.

The present case is not one in which the court should deny to the city its claim to priority for taxes as between itself and the claim of another lien or for rent. In other words, the arrearages of taxes are not of such duration as would warrant the court in rejecting any portion thereof, under the facts of this case.

Final Order.

Entered and Filed June 19th, 1916.

This day this cause came on again to be heard on the papers formerly read and on the petition of the City of Richmond filed herein on the 18th day of June, 1914, praying that the decree entered herein on the 14th day of April, 1914, sustaining the
28 exceptions to the report of Referee Thomas B. Snead, dated and filed on the 12th day of March, 1913, and giving the landlords of the bankrupt, Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock, priority of payment for their rent claims over the claims of the City of Richmond and State of Virginia for arrears of taxes due them, respectively, should be set aside and a rehearing granted to the said city, and was argued by counsel.

On consideration whereof, the court being of the opinion that the said decree of April 14, 1914, should be set aside and annulled, it is ordered that the same be done accordingly; and the court being further of opinion for reasons given in writing that the claims of the City of Richmond for taxes in arrears are entitled to priority over the claims of the said landlords for rent, the court doth accordingly overrule the exceptions to the said report of Referee Thomas B. Snead, filed on the 21st day of March, 1913, by the said landlords, and doth sustain and confirm the said report in so far as it grants priority of payment of the said taxes over the said rent claim. And it appearing to the court that a manifest error was committed in the order of this court of July 14, 1910, by the payment of $2,095.00 to the said landlords on account of rent due and to become due, before the said taxes due the city were paid, and in the failure to retain to the credit of the court in this cause an amount sufficient to pay the said taxes in full in accordance with the agreement between counsel, set forth in the report of the Referee herein, dated July 14, 1910, on which report the said order of this court of that date was based, the court doth adjudge, order and decree that the said Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock do forthwith pay into the Planters National Bank of

Richmond, Virginia, to the credit of the court in this cause, the sum of $127.83, which amount is the necessary refund out of the payment made to them on January 14, 1910, aforesaid, in order to retain to the credit of this court a sum sufficient to pay the taxes due the City of Richmond in full in accordance with the said agreement, and that they file a certificate of the said deposit with the clerk of this court. And the court doth further order that Joseph P. Brady, clerk of this court, shall thereupon draw his checks upon the fund on deposit to the credit of the court in this cause, in the Planters National Bank, which checks shall be countersigned
29 by Thomas S. Snead, referee, in favor of the following named persons for the amounts set opposite to their names, respectively as follows:

Miss M. Hecke, in full for services for taking depositions..	$1.50
John G. Saunders, U. S. marshal, in full for services of said marshal.....	4.00
Joseph P. Brady, clerk, in full for his services herein.....	1.05
T. C. Walford, collector of delinquent taxes for the City of Richmond, account of taxes for 1907, 1908, 1909 and 1910	694.63
Making a total of.....	$701.18

EDMUND WADDILL, JR.,
U. S. District Judge.

Richmond, Va., June 19, 1916.

Stipulation of Counsel as to Record.

Filed August 2nd, 1916.

It is hereby stipulated and agreed between the undersigned counsel that the following described papers in the above matter shall constitute the record in the matter of the petition of Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock to superintend and revise in matter of law, filed in the United States Circuit Court of Appeals for the Fourth Circuit, on June 23, 1916:

1. Report of Thomas B. Snead, referee in bankruptcy, dated July 13, 1910, and filed July 14, 1910.
2. Order entered July 14, 1910, distributing money.
3. Report of Thomas B. Snead, referee in bankruptcy, dated March 12, 1913, and filed same day.
4. Exception of Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock to report of Referee Thomas B. Snead, dated March 12, 1913.
30 5. Order of District Court, entered April 14, 1914, reversing ruling of Referee Snead in his report of March 12, 1913, and establishing claim of landlords for rent.
6. Petition of the City of Richmond asking for a rehearing.
7. Order setting aside order of April 14, 1914, and granting a rehearing on the matters therein involved.

8. Order entered June 19, 1916, finally setting aside order of April 14, 1914, and granting priority to the tax claim of the City of Richmond.

9. Conclusions of the court upon which are based the order of June 19, 1916.

JAMES E. CANNON,
JOHN T. WINGO,
Attorneys for Elizabeth W. Bird, Loulie W. Nolting, and Charles E. Whitlock, Petitioners.
GEO. WAYNE ANDERSON,
Atty. for City of Richmond, Respondent.

August 2nd, 1916.

Clerk's Certificate.

UNITED STATES OF AMERICA,
Eastern District of Virginia, ss:

I, Joseph P. Brady, clerk of the District Court of the United States for the Eastern District of Virginia, do hereby certify that the foregoing is a true transcript of the record made in accordance with stipulation of counsel as appears herein, in the matter of Ainslie Carriage Company, bankrupt.

In testimony whereof, I hereunto set my hand and affix the seal of said District Court, at the City of Richmond, Virginia, this 2nd day of August, A. D. 1916.

[SEAL.] JOSEPH P. BRADY,
Clerk United States District Court,
Eastern District of Virginia.

31 & 32 *Docket Entries.*

June 23, 1916, appearance of James E. Cannon for the petitioners is entered.

July 8, 1916, appearance of George Wayne Anderson for the respondent is entered.

November 15, 1916 (November Term, 1916), cause came on to be heard before Pritchard, Knapp and Woods, Circuit Judges, and is argued by counsel and submitted.

33 *Opinion.*

Filed March 14, 1917.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1461.

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK, Petitioners,

versus

CITY OF RICHMOND, Respondent.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Richmond. In Bankruptcy.

(Argued November 15, 1916; Decided March 14, 1917.)

Before Pritchard, Knapp and Woods, Circuit Judges.

James E. Cannon for Petitioners, and George Wayne Anderson, Assistant City Attorney, for Respondent.

PRICHARD, *Circuit Judge:*

This is a controversy between the landlords of the bank-
34 rupt, Ainslie Carriage Company, claiming a lien upon the bankrupt's assets by virtue of a distress warrant for rent, levied on November 1, 1909, and the City of Richmond claiming priority over the landlords by virtue of certain bills for delinquent personal taxes assessed against the bankrupt for the years 1907, 1908 and 1909, and for current taxes for the year 1910, being the year in which the adjudication in bankruptcy was made.

It is conceded that the landlords levied a distress warrant on the 1st day of November, 1909, and that the City of Richmond made no effort to levy for its delinquent taxes for the years 1907, 1908 and 1909, although given the express power to do so by Section 73 of its Charter in the following language:

"All goods and chattels, wheresoever found, may be distrained and sold for taxes assessed and due thereon * * *."

It appears from the answer of the City of Richmond that the ordinances of the City provide that the taxes for each year are payable on or before June 30th, and, under Chapter 14, Section 7, of Richmond City Code, it is provided that, if all taxes be not paid before September 1st, the Tax Collector shall distrain except where one-half has been paid prior to June 30th.

The situation of the parties on November 1, 1909, may be summarized as follows: The landlords, in pursuance of Chapter 127 of

the Code of Virginia, had distrained for rent to the extent of $2,929.57, at the rate of $2,000.00 per annum. Section 2787 of the Code of Virginia provides that rent of every kind may be recovered by distress on action; Section 2790 that rent may be distrained for within five years from the time it became due, and Section 2791 that distress may be levied on any goods of the lessee, or his assignee, or under tenant, found on the premises, or which have been removed therefrom not more than thirty days. Under the provisions of its Charter the City of Richmond had a right to distrain for taxes due in 1907 on the 1st day of September, 1907, and at any time thereafter; likewise for its 1908 taxes on the 1st day of September, 1908, or any moment thereafter, and for its 1909 taxes it had the same right, all of which continued until the time the landlords made their levy.

35

It is contended by the landlords that inasmuch as they exercised their right of distress, and that the City did not exercise its right to levy and collect, that they acquired a lien upon the bankrupt's assets superior to that of the City. On the other hand, the City claims that its inchoate and unexercised right of distraint gives it a priority over the landlords, and, furthermore, under the Bankruptcy Act, Section 64 (*a*), the taxes are given priority over all other claims.

It appears that the adjudication in bankruptcy was made on the 3rd day of February, 1910, or less than four months after the levy of the landlords, and one of the contentions of the City is that, therefore, under Section 67 (*f*) of the Bankruptcy Act, the landlords were not entitled to any lien at all. The referee made a report under date of July 14, 1910, in which he found that the landlords were entitled to participate in the distribution of the fund arising from the sale of the bankrupt's assets ahead of the claim of the City of Richmond and of the Commonwealth of Virginia for franchise tax and registration fee, but recited an agreement by which final determination of the question should await the decision of the Supreme Court of Appeals of Virginia as to whether, under like circumstances in a case before it, the City and State did in fact have a lien for their taxes without making a levy.

Under date of March 12, 1913, the referee made another report, in which he stated that the case in the Virginia appellate court had gone off on a question of jurisdiction, and in which he proceeded to hold that, under the proper construction of Section 67 (*f*) of the Bankruptcy Act, the landlords were not entitled to a lien, and that being, therefore, relegated to the class of general creditors, the City and State were preferred in the distribution of assets by virtue of Section 64 of the Bankruptcy Act. To this report the landlords filed exceptions, which were treated by the court below as a petition to review such report, and the court, by an order entered on the 14th day of April, 1914, reversed the ruling of the referee and held that the landlords did have a valid lien for their rent under the Bankruptcy Act, and that such took priority over the claims of the State of Virginia and of the City of Richmond.

36

On April 21, 1916, the court below, having previously granted a rehearing on application of the City of Richmond, handed down an opinion reversing its former ruling, and holding that the City's claim for taxes should take priority over the landlords' lien, and carried this ruling into effect by the entry of an order on June 19, 1916, which order we are now asked to review.

We are not unmindful of the importance of the questions involved in this controversy. That the State and its municipalities should be clothed with ample power to assess and collect taxes promptly and with as little delay as possible is conceded. In this suit, as appears from the statement of facts, a controversy has arisen which involves on the one hand the character of a lien to which a landlord is entitled under the laws of the State of Virginia, and on the other the character of a lien for taxes to which the City of Richmond is entitled by virtue of its Charter.

The petitioners rest their "claims upon those statutes of Virginia which are merely declaratory of the common law principle of distress for rent in arrear which obtains in one form or another throughout the entire English-speaking world."

Section 2787 of the Code of Virginia is pertinent to this case, and reaffirms the common law, to-wit:

37 "Rent of every kind may be recovered by distress action."

Section 2790 also provides:

"Rent may be distrained for within five years from the time it becomes due, and not afterwards, whether the lease be ended or not."

Section 2791 is in the following language:

"The distress may be levied on any goods of the lessee, or his assignee, or under tenant, found on the premises, or which may have been removed therefrom not more than thirty days. If the goods of such lessee, assignee, or under tenant, when carried on the premises, are subject to a lien, which is valid against his creditors, his interest only in such goods shall be liable to such distress. If any lien be created thereon while they are on the leased premises, that shall be liable to distress, but not more than one year's rent, whether it shall have accrued before or after the creation of the lien. No other goods shall be liable to distress than such as are declared to be so liable in this section."

In this instance it appears that the landlords proceeded to enforce their statutory rights and to perfect the inchoate lien, which they had by virtue of their lease, by levying a distress warrant for eighteen months' rent, which gave them a lien subject to the provisions of Section 2792, in which it is provided that "neither this or the preceding section shall effect any lien for taxes, levies, or militia fines."

The referee who passed upon this question in his second report held that this lien was of no effect because of Section 67 (*f*) of the Bankruptcy Act, that part which is germane being in the following language:

"All levies, judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent at any

time within four months prior to the filing of a petition
38 against him shall be deemed null and void in case he is adjudged a bankrupt * * *."

The framers of the Bankruptcy Act in employing the words "levies," etc., obviously had reference to writs of execution, fi. fa. garnishment, etc. In other words, this section is limited to liens obtained through legal proceedings. This, we think, easily distinguishes the liens contemplated by Section 67 (*f*) from the landlords' lien, which is not, in any sense of the word, a lien obtained through legal proceedings. Collier on Bankruptcy, at page 966, in referring to levies under Section 67 (*f*), says:

"A lien acquired by a levy under a landlord's distress warrant is not obtained through legal proceedings within the meaning of this sub-section."

A landlord's lien is contra-distinguished from the other class of liens to which we have referred in that it is inchoate from the moment the lease is executed, and may be made perfect at any moment by distress, a remedy which is summary in its character.

The Bankruptcy Act is intended to prevent one general creditor from obtaining an advantage over another. In other words, it was the intention of the Congress in the enactment of this law that where one becomes unable, by misfortune or otherwise, to meet his obligations to preserve the status of his estate so that there may be an equal distribution of his assets between all his creditors subject to the claims of lien creditors whose standing is fixed by the statute. In other words, to prevent preferences and secure a fair and impartial distribution of the bankrupt's estate among his creditors, having, as we have stated, due regard to the valid liens of any of his secured creditors.

We do not think there is anything in the statute to authorize the contention that a landlord should be treated as a general
39 creditor and thus deprive him of the lien which is guaranteed by the statutes to which we have referred. Remington on Bankruptcy, Section 1160, in referring to this point, says:

"A landlord's lien for rent, or right of priority on distribution, is not impaired by the bankruptcy act. But the subject is complicated by the fact that landlords are frequently also given priority by state law, upon distribution of an insolvent estate, regardless of lien, and that this priority is preserved in bankruptcy by Section 64 (*b*)."

The referee in the report to which we have referred cites the case of Westside Paper Company, 20 A. B. R. 289, in support of his contention. In that case the District Court held that a levy of a distress warrant for rent made within four months was invalid. However, this case was carried to the Circuit Court of Appeals for the Third Circuit, where the judgment of the lower court was reversed. 162 Fed. 110. That court in referring to this phase of the question said:

"Distress for rent in arrear is one of the most ancient as well as 'one of the most efficient of the landlord's remedies for the collection of rent.' It is in most of our States, as it was at comman

law, a right sui generis belonging to the landlord whenever the right of landlord and tenant existed. It appears to have been abolished in a few of the States, and in most of them its exercise has been regulated by statute. Its essential characteristics are, however, for the most part, the same as existed at common law. * * * The right to distrain or levy upon all the goods upon the demised premises, whether those of a tenant or a stranger, arises the moment the relation of landlord and tenant is established. It is a right in the nature of a lien, rather than a lien, until the goods are actually distrained under a landlord's warrant. * * * No suit or proceeding at law, whether in personam or in rem, in the proper sense of those words, was necessary for the assertion of this right. It belongs to that small category of personal rights, the assertion of which has always been independent of legal procedure; of which the right to abate a nuisance, under certain circumstances, and the right to distrain cattle damage feasant, are examples.

"While there is no specific lien, except on the goods actually distrained under the landlord's warrant, all the goods on the demised premises are to be considered as being under a quasi pledge, which gives superiority to the specific lien established by the distraint. Such a lien is in no sense 'obtained through legal proceedings.' Nor is it within the spirit of the bankrupt law in this regard, as evidenced by other provisions thereof, as well as that of 67 (*f*) above quoted."

Also, the case of In re Burns, 175 Fed. 633, is very much in point.

This question was also passed upon in the case of In re Smith & Robinson, 154 Fed. 343. In that case a distress warrant was levied just two days before the petition in bankruptcy was filed. The learned judge who heard the case, after citing sub-Sections *c* and *f* of Section 67, then stated the claim of the appellants as follows:

"That the seizure in distress is, within these paragraphs, in the nature of a suit or proceeding in attachment, and having been begun within the four months before bankruptcy is annulled by the adjudication in bankruptcy.

"We cannot concur in this view. The whole question is one of interpretation of the Bankrupt Act—the policy of that act respecting the recognition of liens in the distribution of bankrupt estate. Paragraphs *c* and *f* quoted were meant, in our judgment, to relate only to those actions or proceedings taken by creditors, who having no existing lien or right of lien resting in existing contract, entered into in good faith, seek to obtain preference by being first in a race of diligence.

"But the lien obtained by the distress warrant under the kind of lease involved in this case is not the result of a race of diligence. Under the lease * * * the right of lien was created when the lease was executed and the tenant entered upon possession of the premises—a right put wholly, at that time, within the control of the landlord and maturing the moment the

landlord chose to mature it. And though it did not actually attach until within four months of the bankruptcy, it was the kind of lien, it seems to us, that section 67-*d* was intended to preserve; for unquestionably as between the parties to the lease it was a lien, not simply because the distress warrant was actually levied, but because, by contract between them, the levy of the distress warrant was authorized."

There are a number of other cases wherein the Court of Appeals in the other Circuits have taken the same view of this matter. In the case of In re Emslie, 42 C. C. A. 350, where a mechanics' lien was filed within four months preceding the adjudication in bankruptcy the Circuit Court of Appeals for the Second Circuit held that it was protected by Section 67 (*d*). The court in that case in referring to this point said:

"There are no equitable considerations in favor of the general creditors of a debtor which should defeat a mechanics' lien. Every creditor dealing with the debtor does so with the knowledge that those who are furnishing labor and materials for the building can, if they choose, acquire a priority of payment over other creditors. Statutes giving such liens are designed to enable mechanics and material men to rely upon the security of the building itself, without looking to the responsibility of the owner. The justice and expediency of giving such claims priority over the debts of general creditors is manifested in the legislation of the several States. We cannot believe that it was the intention of Congress to put them upon the footing of the liens particularly mentioned in Section 67. The question of the validity of such liens was considered by the Circuit Court of Appeals for the Seventh Circuit. In re Kerby-Dennis Co., 36 C. C. A. 677, 95 Fed. 116. In considering the provisions of Section 67 the court used this language:

" 'We cannot indulge the presumption that Congress intended to avoid a lien secured by the act of labor, and preserved and
42 continued in force only when legal proceedings are instituted within a specified time. Such a construction would avoid all mechanic's liens, and all the liens of laborers, which the laws of various States have for years sought to protect and to prefer.'

"We agree with the opinion of that court that the terms of Section 67 do not invalidate such a lien."

In re Yoke Vitrified Brick Co., 180 Fed. 235.

In the case of In re West Norfolk, 112 Fed. 767, Waddill, District Judge, in referring to the statute which provides for a supply lien, said:

"The time of furnishing the supplies is the period as to which the material man is given a right of lien. The right to claim the lien arises under this section, and may be enforced at any time after the supplies are furnished; but may be lost by failure to comply with some provision of the act giving the right. The only requirement is that the lien shall be filed within ninety days after the last item of the bill becomes due and payable. If the claim is

filed within that time, the lien secured relates to the time the supplies were furnished."

Likewise, under the Virginia statute the lien dates from the time the tenant takes the lease and places his goods upon the premises; such right is inchoate and continues as such until a distress warrant is executed on the property. In other words, the landlord's right is in the nature of a lien, and to enforce which he has only to comply with the provisions of the statute that authorizes distraint, and when the distraint is executed it relates, as it was said in the case just quoted, to the date when the tenancy began.

It is insisted that Section 64 (*a*) of the Bankruptcy Act gives the claim of the City priority over that of the landlords. The Section in question is in the following language:

43 "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court."

It should be borne in mind that the landlords do not invoke this section, but place their claim upon the ground that they are lien creditors. Section 67 (*d*) reads as follows:

"Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall to the extent of such present consideration only, not be affected by this act."

There is nothing contained in the foregoing that could be construed so as to affect the lien of the landlords. Section 64 (*a*) has no reference to lien creditors, but is intended to apply only to general creditors, and should be read in connection with sub-Section *b* relating to debts that are to be paid in full, to-wit: costs of preserving the estate; filing fees in involuntary cases; costs of administration; wages; debts entitled to priority by the laws of any State or the United States.

Counsel for respondent, among other things, say:

"It will be observed that the language of Section 64 (*a*) is that the taxes are to be paid prior to 'dividends to creditors.' There can be no controversy over their priority to unsecured creditors but it is claimed by petitioners that, having secured a lien by a distress levy prior to the petition and adjudication, they are entitled to be paid in full in preference to the taxes, upon the theory that they

44 do not get a dividend and that dividends are only paid to unsecured creditors. That this is erroneous has been held in the cases of re Muhlhauser, 9 A. B, 81, and re Barber, 97 Fed. 547. In the last named case the meaning of the word 'dividend' is discussed at length * * *."

While it is true the cases of In re Muhlhauser and In re Barber, supra, sustain the contention of respondent, nevertheless the great

weight of authority is to the contrary. The term as employed in the Bankruptcy Act is well defined in the case of Hawthorne vs. Hendrie & Bolthoff Mfg. & Supply Co., 50 Colo. 342. This definition is also to be found in Words and Phrases, Vol. 2, page 102 (Second Series), as follows:

"Under Bankr. Act July 1, 1898, c. 541, Section 65-*a*, 30 Stat. 563, providing that dividends of an equal per centum shall be declared and paid on all allowed claims except such as have priority or are secured, the word 'dividends' as used in the bankruptcy act applies only to claims of general unsecured creditors and not to secured creditors, except as to the amount of the claim in excess of the security."

In the case of In re Utt, Vol. 5, A. B. R., 383, the Circuit Court of Appeals for the Seventh Circuit, in passing upon this point, said:

"The point in dispute is: What is the meaning of 'dividends,' as the word is used in these provisions? The question has been considered in a number of cases by the District Courts. In re Ft. Wayne Electric Corp. (D. C.), 3 Am. B. R. 186, 94 Fed. 109; In re Fielding (D. C.), 3 Am. B. R. 135, 96 Fed. 800; In re Barber (D. C.), 3 Am. B. R. 306, 97 Fed. 547; In re Sabine, 1 Am. B. R. 321. We agree with the conclusion declared in the first two of these cases that the sums to be paid upon secured claims or other claims entitled to priority of payment are not 'dividends' upon which the trustee or referee may receive a commission. This is made clear by other provisions of the statute. By Sections 56*b* and 57*e* creditors holding claims which are secured or have priority can vote at creditors' meetings, or their claims be counted in computing either the number of creditors or the amount of their claims, only when the claims exceed the value of the securities or priorities, and then only for the excess. They are treated as creditors only for the unsecured excess. Section 65*a* declares that 'dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured.' This, if not strictly speaking a definition of the word 'dividend,' is equivalent to a declaration that in this respect claims having priority and secured claims are upon the same footing. The opinion in the Barber Case, supra, recognizes this construction, but makes a distinction against secured creditors who invoke the action of the bankruptcy court, and through the action of that court alone have their security converted into a fund in the hands of the trustee. 'If a secured creditor,' it is said, 'refrains from asking or invoking the aid of the court of bankruptcy to enable him, through its officers, and its exercise of jurisdiction, to turn his securities into cash, then, although the court, for the benefit of the unsecured creditors, should use its equitable power to the extent of selling the incumbered property free and discharged of the incumbrance, assuming to care for the equitable rights of the secured creditor in its disposition of the moneys arising from the sale, there would seem to be reason for holding that the moneys going to the secured creditor under such circumstances only came into the case incidentally as the result of the effort to realize and obtain other money for the unsecured

creditors, and that it should not be regarded as any dividend, or charged with any commissions. * * *.' We find no warrant for this distinction in the terms of the statute."

Also, Collier on Bankruptcy (10th Edition), page 16, in referring to In re Barber, supra, among other things, says:

"It may be doubted whether this is correct since under Section 65 (*a*) dividends can only be paid on claims which are neither secured or entitled to priority."

46 It is obvious that the word "dividend" as employed in Section 64 (*a*) of the Bankruptcy Act was intended to apply to all claims except such as are secured or have priority.

In the case of New Jersey vs. Lovell, 179 Fed. 321, it was contended that the taxes due the State should take priority over costs, including those in preserving the bankrupt's estate after filing the petition. The Circuit Court of Appeals for the Third Circuit, after quoting sub-Sections *a* and *b*, said:

"Now while the relative order in which sub-divisions (*a*) and (*b*) are placed is not happy and indeed tends to mislead, yet the general intent of the section is clear. In sub-division (*b*) we find the general scheme of awarding priority in advance of dividend creditors. That sub-division makes provision for paying such costs, fees and liens as are therein provided, and if there are no outstanding taxes, the fund is then paid to creditors. But before paying creditors, sub-division (*a*) intervenes and makes provision for what, if omitted, has often proved a hardship, if not indeed, an abuse, in the settlement of decedent and insolvent estates, viz., delay in payment of taxes. Tax collectors whose powers to distrain lapsed when the estate passed into the custody of the law, or who were left to come in as general creditors, were subjected to trying delays. Obviously sub-division (*a*) meant that this delay should not occur, and therefore provided that, 'in advance of payments of dividends to creditors,' the court shall order the trustee to pay 'all taxes legally due and owing by the bankrupt * * *,' and to prevent delay from questions concerning such taxes, it provided, in case any question arises as to the amount or legality of any such tax, the same shall be heard and determined by the court. And yet in case the court had to take testimony or order a reference to determine the legality of such tax, the adjudged tax would, under the construction here contended for, absorb the whole fund and leave unpaid the agency by which its payment was effected. Now whether the 'creditors' referred to in the phrase 'in advance of the payment of dividends to

47 creditors' places the payment of taxes ahead of dividend creditors alone, or places it also ahead of those creditors who, under sub-divisions (4) and (5) are paid in full, is a question not before us. It suffices to say that on the question that is before us, namely, whether the taxes of a State are under clause (*a*) given priority over the actual and necessary cost of preserving the estate subsequent to filing of the petition we are clear they are not."

The State of New Jersey in that case applied for a writ of certiorari to the Supreme Court of the United States, which was denied.

This court in the case of Mills vs. Virginia-Carolina Lumber Co., 164 Fed. 168, in passing upon this question said:

"Aside from the mere cost incident to the proof of the claim, we do not see how this creditor should be required to pay any part of the costs of the administration of this bankrupt's estate. The lumber company had its claim secured by deed in trust on the property of the bankrupt, and it was entitled to have its claim paid in full, provided the property so conveyed would bring enough. The trustee in bankruptcy elected to sell this property and has the proceeds of the sale in hand. The lumber company, in our opinion, is entitled to have of the proceeds of the sale sufficient to pay its debt and interest, provided there is enough. If the property did not bring enough to pay the debt and interest in full, then the lumber company is entitled to have the whole of the proceeds. In other words, this creditor, which has simply come into a bankrupt court and established a debt that is a lien upon specific property of the bankrupt, should not be charged, so as to reduce the security, by making the fund arising from such specific property liable for the costs of the general administration of the bankrupt's estate."

We do not deem it necessary to extend this discussion further than to say that there are numerous cases in support of the rule which we have announced, notably among them being In re
48 Williams Estate, 84 C. C. A. 434; In re Howard, 207 Fed. 402; In re Zahner, 193 Fed. 769; In re Halsey, 175 Fed. 825.

We will next consider the question as to whether under the laws of Virginia, including the Charter of the City of Richmond, the respondent is entitled to priority over the claim of the landlords in the absence of a levy pursuant to the authority granted by the Charter of the City. Section 73 of the Charter of the City of Richmond is in the following language:

"All goods and chattels wheresoever found may be distrained and sold for taxes assessed and due thereon, and no deed, or trust, or mortgage upon goods or chatatels shall prevent the same from being distrained and sold for taxes assessed against the grantor in such deed while such goods and chattels remain in the grantor's possession, nor shall any such deed prevent the goods and chattels from being distrained and sold for taxes assessed thereon, no matter in whose possession they may be found."

The Court below in referring to this section said that

"There is no limitation apparently upon the City's right of distraint for its past and present taxes."

This section is undoubtedly broad in its scope, and a casual reading of the same is calculated to give one the impression that a lien for taxes is given priority over all liens of whatsoever character. However, a careful analysis of the same leads us to the conclusion that the words, "for taxes due thereon," is in the nature of a limitation confining the lien thus given to the personal property on which the assessment is made for the current year. If this be the correct interpretation, then the State would only have a right to levy on

such property as it could show was owned and in the possession of the tenant at the time the levy was made.

49 Under the Charter of the City of Richmond complete and summary power is granted by which any taxes then due may be collected. In this instance it appears that notwithstanding the fact that the tax collector, who had ample authority to collect the taxes assessed and due for each year; took no steps to collect the same for a period of three years. Can it be possible that in a case where a third party acquires a lien upon the property on which assessment has been made he is to be deprived of the right thus acquired for years other than the current year upon which the assessment is made? It seems to us that a fair interpretation of this would be that the City has a right, independent of deeds of trust, mortgages or otherwise, to distrain and collect taxes upon such property for the year for which such assessment is made and where such property can be identified. It would be manifestly unfair in a case like the one at bar to permit the City, after it has neglected to collect the taxes by distraint and sale of the property for the years in which the levy is made, to thereafter displace the landlord's lien in favor of the City. We think that in order for the City to reach this property by levy it would have been necessary for it to have shown that the goods and chattels in the possession of the trustee were the same goods and chattels which the bankrupt had and on which taxes were assessed for the previous years. From the very nature of things, a stock of material and carriages, like a stock of goods is constantly changing, being diminished and replenished daily by sales and purchases, and there is no evidence to show that the landlords had in their possession in 1910 any of the material or carriages upon which the assessment was made for 1907, 1908 and 1909. The City having failed to establish this fact in the absence of such proof it thereby lost the right to levy upon the goods of the bankrupt for any year anterior to 1910.

The case of Taylor vs. Sutherlin-Meade Co., 107 Va. 787, is cited by counsel for petitioners in support of the caontention that

50 it is the duty of the court before distributing the funds under its control to provide for the payment of taxes and levies due by the bankrupt. It should be borne in mind that the question of delinquent taxes was not involved in that case. There the court expressly said that the appointment of a receiver had prevented a levy. From this expression we must infer that a receiver had been appointed before the taxes became due and before the City had the right to levy upon the property in question. Therefore, there is quite a distinction between that case and the case at bar. There the court speaks of the City being denied an opportunity to collect its taxes by levy. In this instance the City had an opportunity to collect the taxes but utterly failed to avail itself of the summary remedy afforded by the provisions of the law which authorized the assessment and collection of taxes.

The Supreme Court of Virginia passed upon this question in the case of Jackson Coal Co. vs. Phillips Line (Va.), 75 S. E. 681. In that case the court of first instance gave the State and the City of

Petersburg priority for delinquent taxes over lien as well as general creditors of the insolvent steamship line, which was in the hands of receivers. The court in passing upon this phase of the question said:

"With respect to that part of the decree appealed from, which directed the payment of taxes due from the Philips Line, and its predecessor in title, to the State of Virginia and the City of Petersburg, out of the fund under the control of the court, and giving the taxes priority of payment over the creditors of the receivers, the court erred, except as to the taxes for the year 1910. The property upon which these taxes were assessed was wholly personal, and no effort appears to have been made, certainly as to the years prior to 1910, either by the Auditor of the State or by the City of Petersburg, to collect the taxes until the property was placed in the hands of the receivers in this cause and an account of debts against the
51 Phillips Line ordered. The State had a right, under Sections 604-623 of the Code, for one year from the date on which the taxes in her favor were assessed to levy upon the property assessed with the taxes, which right was not exercised; and it appears that the City of Petersburg had a right of distress against the property assessed with taxes in its favor, which the City might have exercised before the taxes were returned delinquent, or the property upon which they were assessed had passed into the hands of subsequent purchasers, and thereby secured a lien therefor, but these rights were never exercised.

"Under these circumstances, neither the State nor the City had a lien upon the property of the Phillips Line when it went into the hands of the receivers for the taxes due them, respectively, and, therefore, the position of the State and City was no better than that of the general creditors of the company, and they were not entitled to share in the proceeds of sale of the company's property, except as to the amount of taxes due them (the State and City), respectively, for the year 1910, assessed against the receivers."

This decision, coming as it does from the highest court of the State, clearly indicates the rights of the City under the facts of this case, and, we think, is conclusive. Taylor vs. Secor, 92 U. S. 575; Lewis vs. Munson, 151 U. S. 554.

The Supreme Court of the United States in speaking of the weight to be given to the decisions of the highest court of a State bearing upon local questions of this character, in the case of Bailey vs. McGuire, 89 U. S. 215, employed the following language:

"The whole subject we have discussed recently came before the Supreme Court of Missouri in the case of The Pacific Railroad Company vs. Cass County. The assessor of Cass County had levied taxes for both State and county purposes on the property of the company in the county, and the question was whether these levies were authorized. The court held that the taxes for county purposes were rightfully assessed, under the general revenue laws, but that the taxes for State purposes were unauthorized, because Sec-

52 tion 12 of the Act of 1852 had been repealed either by an express provision of a subsequent law or by necessary implication, and being in force, State taxes could only be collected in the way pointed out in that section.

"As it is the peculiar province of the highest court of a State to decide whether or not the method pursued in the assessment and collection of taxes is in conformity with the law of the State, this decision is controlling."

From what we have said it follows that the City and State had the right to levy and collect the taxes for the year 1910, its tax collector having used due diligence as to the collection of taxes for that year. However, as to the years 1907, 1908 and 1909 we are of opinion that the lien of the landlords is entitled to priority over that of the City, and that the court below was in error as respects this phase of the case.

We have carefully examined the cases relied upon by the City, but in the light of the authorities we have cited bearing upon the Bankruptcy Act, as well as the case of Jackson Coal Company vs. Phillips Line, supra, we are of opinion that the judgment of the lower court should be reversed and the case remanded with instructions for further proceedings in accordance with the views herein expressed.

Reversed.

WOODS, *Circuit Judge*, dissenting:

The Ainslie Carriage Company was adjudicated a bankrupt on February 3, 1910. In the distribution of the funds derived from the sale of its property a contest arose between the City of Richmond, claiming arrears of taxes, and Elizabeth M. Bird, Loulie M. Nolting and Charles E. Whitlock, claiming rent due them as owners of the premises occupied for business purposes by the carriage company.

The question to be decided is whether the District Court was
53 right in holding that the taxes should be paid in preference to the rent.

The facts are: On November 1, 1909, the petitioners levied a distress warrant on the goods and chattels found on the premises leased from them by the carriage company for $2,929.57 arrears of rent. Before sale could be made the Chancery Court of the City of Richmond took charge of all the assets of the carriage company, and was administering them at the time of the adjudication in bankruptcy, when all the assets were turned over to the District Court for the Eastern District of Virginia. Upon the estate coming into the hands of the bankruptcy court the petitioners proved their debt for rent, and claimed the proceeds of sale by virtue of the lien acquired by levy of the distress warrant under Sections 2791 and 2792 of Virginia Code. At the time the distress warrant was issued, taxes on the property were due to the City of Richmond for the years 1907, 1908 and 1909, and after it passed into the hands of the Court of Chancery the taxes for 1910 became due, the whole amounting to $657. The landlords conceded that the taxes for the year 1910 should be paid in preference to their claim, but asserted

their lien to be superior to that of the City for the delinquent taxes of 1907, 1908 and 1909. There is no claim on the part of the City that the landlords' lien was invalid under Section 67 (*f*) of the Bankruptcy Act because perfected by distress within four months of bankruptcy. In re Emslie, 102 Fed. 291, 42 C. C. A. 350; In re Smith, 154 Fed. 343; In re Westside Paper Co., 162 Fed. 110.

We consider first the effect of the Virginia statutes. Section 2792 relating to distress for rent puts this limitation upon the effect of the levy of the warrant: "Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines." It will be observed that the statute does not expressly create a lien in favor of the landlord by virtue of the distress for rent, but does so only by necessary implication. By an implication still stronger the
54 following section of the Charter of the City of Richmond confers a lien of taxes on personal property:

"Sec. 73. All goods and chattels wheresoever found may be distrained and sold for taxes assessed and due thereon, and no deed of trust or mortgage upon goods or chattels shall prevent the same from being distrained and sold for taxes assessed against the grantor in such deed while such goods and chattels remain in the grantor's possession, nor shall any such deed prevent the goods and chattels from being distrained and sold for taxes thereon, no matter in whose possession they may be found."

The right to distrain and sell goods and chattels for taxes "wheresover found" means that they may be taken if found in the hands of one holding under the landlords' right or any other claim whatever. It seems to me that this is the meaning of the law beyond all doubt, but if there were any doubt it should be resolved in favor of the collection of the public revenue. Indeed, this construction seems to be conceded, for it is admitted that the rent claim must yield to the taxes for the year 1910; and it was the construction adopted by the Supreme Court of Virginia in Jackson vs. Phillip's Line, 114 Va. 40, as to the taxes for the current year due the City of Petersburg.

In the case cited it was decided, however, that the right of the State to levy for taxes expired at the end of one year from the date at which the taxes were assessed; and "that the City of Petersburg had a right of distress against the property assessed with taxes in its favor, which the City might have exercised before the taxes were returned delinquent, or the property upon which they were assessed had passed into the hands of subsequent purchasers, and thereby have secured a lien therefor, but these rights were never ex-
55 ercised." The Charter of the City of Richmond contains no such limitations as to taxes after they are returned delinquent; but on the contrary provides by Section 51 that the officer charged with the collection of delinquent taxes "shall have the same power to collect by the same means and processes all bills, assessments and accounts delivered to him as are conferred by the City Charter upon the Collector of Taxes." The case before us is thus clearly distinguished from Jackson vs. Phillip's Line, and falls within the general principles so well stated in Taylor vs. Sutherlin,

etc., Co., 107 Va. 797. Hence, it follows that there was the same right of distress for the collection of taxes due the City of Richmond, and delinquent for the years 1907, 1908 and 1909 as for the current taxes of 1910.

If this reasoning be sound, the petitioners' claim to have a lien under the Virginia statute superior to the claim of the City of Richmond for taxes must rest upon this proposition: After the levy of the distress warrant for rent on behalf of the petitioners, the City might nevertheless have levied under a distress warrant for taxes and thus displaced to the extent of the taxes the lien of the landlords; but since the court took the property after the lien of the landlord had attached to it by distress, and thus made impossible a levy on behalf of the city, the right of the City to acquire the superior lien or preference was forever lost. It would indeed be a curious result for a court to seize property in the interest of general creditors, and thus forbid the City to exercise its statutory right of perfecting its inchoate lien by levy and then penalize it for not exercising the right. In such circumstances the court necessarily deals with the City as if it had actually done that which the court incidentally in the interest of others had prevented it from doing. The matter is thus disposed of by the Supreme Court, quoting with approval Greeley vs. Providence Savings Bank, 98 Mo. 458:

56 "It may be conceded that the State did not have an express lien upon the assets that went into the hands of the receiver, but it had a right paramount to other creditors to be paid out of those assets—a right which it could have enforced through its revenue officers by the summary process of distress—but for the fact that the property and assets of its debtor had passed into the custody of its courts; whose duty it was in the administration and distribution of those assets to respect that paramount right, upon the untrammelled exercise of which depends the power to protect the very fund being distributed, and to maintain the existence of the tribunal engaged in distributing it; and to make no order for the distribution of assets in custodia legis except in subordination to that right." In re Tyler, 149 U. S. 164; Taylor vs. Sutherlin, etc., Co., 107 Va. 797.

The statutes of Virginia 1897-98, page 824, V. C. Section 492 (*b*), forbid any court to distribute or dispose of funds or other property without first paying the taxes thereon.

The argument is presented that Section 73 of the Charter of the City of Richmond authorizes a levy on property only for taxes due thereon—that is, on the identical property assessed, and that the property in the hands of the court is not the property upon which the taxes were assessed. The argument falls for several reasons. First, the petition before us and the entire record refer throughout to the property levied on for rent as identical with that upon which the taxes were in arrears for 1907, 1908 and 1909; and the court should not assume that it is a shifting stock of goods. Second, even if it be assumed without proof that the property was a stock of merchandise changing in its items in the course of trade, surely it should not be assumed further that all of the goods in stock when

the taxes were assessed had been sold in the course of trade. The entire property realized in the hands of the court $3,343.02. The aggregate of the City taxes was $657. I do not perceive upon what ground it can be assumed that the entire stock had been pur-
57 chased since the taxes were assessed in 1907, 1908 and 1909, or that of the total stock, $3,343.02, found on hand there was not $657 worth on hand at the date of the assessment. Third, but even if it be assumed that the property was a shifting stock of goods and that all of its items had changed in the course of business, the argument is still unsound. Of necessity the law considers a merchant's stock a definite entity upon which the taxes are assessed and remaining the same aggregate entity until the taxes are paid, notwithstanding the changing of the items in the regular and anticipated course of trade. Surely it cannot be the law that if a dealer's stock of dry goods or groceries are assessed for taxes in January and in the course of business the dealer sells all of the particular goods then on hand, replacing them with others, the City would be unable to enforce its right by levy on the stock because the items of stock had been changed.

There is no force in the suggestion that the City lost any right conferred either by the Federal or State statute by the mere procrastination of its officers. Robertson vs. Sichel, 127 U. S. 507; Howard vs. Richmond, 94 Va. 79. It is no hardship that a preference is given for taxes for all may ascertain if they have been paid by inquiry at the proper office.

It thus seems clear that if the Bankruptcy Act were silent on the subject, the statutes and decisions of Virginia require all taxes due the City to be paid in preference to the distress for rent.

Let it be assumed, however contrary to this conclusion, that the view most favorable to the petitioners is correct, namely, that the landlords acquired by their distress for rent a first lien on the property under the statute law of Virginia, which could not have been displaced by the levy of a distress warrant for the delinquent city taxes. Nevertheless, under the bankruptcy statute the court is required in accordance with the general equity rule to pay the taxes before distribution of the proceeds of the sale to the
58 petitioners or any other lien creditors. The following sections seem to make this very clear:

"#64 (*a*). The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district or municipality in advance of the payment of dividends to creditors, and upon filing the receipt of the public officers for such payment shall be credited with the amount thereof, and in case any question arises as to the amount or legality of any such tax the same shall be heard and determined by the court.

"#57 (L). Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole or the proportional part thereof if rejected only in part.

"#65 (*a*). Dividends of an equal percentum shall be declared

and paid on all allowed claims, except such as have priority or are secured."

The requirement put upon the court itself by Section 64 (*a*) to pay taxes in advance of the payment of dividends is not limited in its application to dividends to unsecured creditors. Taxes are not debts, and the statute means that they are to be paid in preference to all debts.

The statute by Section 57 undertakes to provide for the proof of secured as well as unsecured claims, and for the rights of all classes of creditors; and in sub-division (L) of that section the word "dividend" must be referred to the distribution of the assets to all classes before referred to in the section, that is, secured or unsecured, and the recovery of dividends improperly paid to any creditor of any class mentioned, secured or unsecured.

Section 65 (*a*) clearly means that dividends of equal per cent. shall be paid on all allowed claims, and that dividends on secured claims shall be paid in view of their priority.

59 & 60 It could hardly be denied that the pro-rata distribution of the proceeds of the sale of the property of a bankrupt corporation to the holders of its mortgage bonds would be the payment of dividends to them. To restrict the meaning of "dividend" to payments made to unsecured creditors would not only distort the act, but would mean that the act had made no provision whatever for distribution of assets in the hands of the court belonging to secured creditors of the same class or different classes. The word "dividend" is not one of the words limited in its meaning by a definition contained in the act itself, and hence it has its usual well-known meaning, per centum of payments made in the distribution of funds in the hands of the court to all creditors whose claims are before it. It is true it is more frequently used in the act in connection with the distribution to unsecured creditors; but that is not controlling, for the same word or phrase often has a different meaning in the same statute according to its association. American S. Co. vs. Commissioners, 224 U. S. 491. The universally recognized rule of practice is that the courts, even when there is no statute on the subject, pay the taxes on property from the proceeds of its sale before paying dividends on debts of lien creditors, and that too without respect to whether taxes have been made a lien by statute or not. In Section 64 (*a*) of the Bankruptcy Act Congress has by statute enjoined on the courts the observance of this rule.

In support of this conclusion it seems only necessary to refer to In re Tyler, 149 U. S. 184; New Jersey vs. Anderson, 203 U. S. 483; 2 Remington on Bankruptcy (2nd Ed.), Sections 2141-2144, and cases cited.

I think the judgment of the District Court should be affirmed.

61 *Judgment.*

Filed and Entered March 15, 1917.

United States Circuit Court of Appeals, Fourth Circuit.

No. 1461.

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK, Petitioners,

vs.

CITY OF RICHMOND, Respondent.

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia. In Bankruptcy.

This cause came on to be heard upon the petition and upon the answer of respondent, and on the transcript of record of the proceedings of the District Court of the Matter brought up for review, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, in the matter brought up for review, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the District Court of the United States for the Eastern District of Virginia, at Richmond, for further proceedings in accordance with the opinion of this Court.

J. C. PRITCHARD,
U. S. Circuit Judge.

March 15, 1917.

On another day, to-wit, April 16, 1917, certified copy of the judgment of this Court is transmitted to the Clerk of the District Court at Richmond, Va.

62 *Stipulation of Counsel as to City Ordinances.*

Filed May 9, 1917.

Richmond, Virginia,

9th May, 1917.

Hon. James E. Cannon, Attorney at Law, Mutual Building, Richmond, Virginia.

DEAR SIR: Please take notice that I have applied to the United States Circuit Court of Appeals for the Fourth Circuit for a certified copy of the record in the case of Elizabeth W. Bird, Loulie W. Nolt-

ing and Charles E. Whitlock vs. City of Richmond. In the argument of this case before the Circuit Court of Appeals the ordinances of the City, relied upon and cited in the brief, were used as though in the record by stipulation of counsel, in conformity with my letter to you of September 27th, 1916, although I do not find any formal consent of record on your part. I therefore, request that you will—in acknowledging this notice—give your formal consent that all ordinances of the City cited in the brief shall be considered as in the record by stipulation of counsel.

Yours very truly,

GEO. WAYNE ANDERSON,
Assistant City Attorney.

I acknowledge the foregoing notice on this the 9th day of May, 1917, and I agree that the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit shall insert in the record a stipulation that all ordinances of the City of Richmond cited in the brief of the City shall be considered a part of the record on the petition for a Writ of Certiorari.

JAMES E. CANNON,
Attorney for Elizabeth W. Bird, Loulie W. Nolting, and Chas. E. Whitlock.

63 *Clerk's Certificate.*

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the records and files of the said Circuit Court of Appeals.

In Testimony Whereof, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, this 10th day of May, A. D., 1917.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, Fourth Circuit,
By CLAUDE M. DEAN,
Deputy Clerk.

64 UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fourth Circuit.

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United

States in the cause therein entitled on the 14th day of June, 1917, by annexing hereto a certified copy of the stipulation of Counsel of record, that the certified transcript of the record herein, now on file in the office of the Clerk of the Supreme Court, may be taken as the return of the Clerk of the Circuit Court of Appeals for the Fourth Circuit to the writ of certiorari issued herein.

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 27th day of June, A. D., 1917.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals,
Fourth Circuit,
By CLAUDE M. DEAN, *Deputy Clerk.*

65 UNITED STATES OF AMERICA, *ss:*

United States Circuit Court of Appeals, Fourth Circuit.

No. 1461.

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK, Petitioners,

vs.

CITY OF RICHMOND, Respondent.

Stipulation as to Return.

It is hereby stipulated by counsel for the parties to the above entitled cause that the certified transcript of the record herein, now on file in the office of the Clerk of the Supreme Court of the United States, may be taken as the return of the Clerk of the United States Circuit Court of Appeals for the Fourth Circuit to the writ of certiorari issued herein.

June 15, 1917.

JAMES E. CANNON,
Counsel for Petitioners.
GEORGE WAYNE ANDERSON,
Counsel for Respondent.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing stipulation of Counsel is a true copy of the original filed June 27, 1917, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof, I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 27th day of June, A. D., 1917.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals,
Fourth Circuit,
By CLAUDE M. DEAN, *Deputy Clerk.*

66 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock are petitioners, and City of Richmond is respondent, No. 1461, which suit was removed into the said Circuit Court of Appeals by virtue of a petition to superintend and revise, in matter of law, proceedings of the District Court of the United States for the Eastern District of Virginia, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command
67 you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the fourteenth day of June, in the year of our Lord one thousand nine hundred and seventeen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

68 [Endorsed:] 510-17. File No. 25,969. Supreme Court of the United States, October Term, 1916. No. 1139. The City of Richmond vs. Elizabeth W. Bird et al. Writ of Certiorari.

69 [Endorsed:] File No. 25,969. Supreme Court U. S., October Term, 1917. Term No. 510. The City of Richmond vs. Elizabeth W. Bird et al. Writ of certiorari and return. Filed June 28, 1917.

Office Supreme Court, U. S.
FILED
MAY 22 1917
JAMES D. MAHER
CLERK

No. 1[redacted]5[redacted]195

IN THE

Supreme Court of the United States

The CITY OF RICHMOND, a municipal corporation,
Petitioner

vs.

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK,
Respondents

The petition of the City of Richmond for a Writ of Certiorari directed to the Circuit Court of Appeals for the Fourth Circuit to bring before the Supreme Court the case of Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock, Petitioners, v. the City of Richmond, Respondent.

IN THE

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The CITY OF RICHMOND, a municipal corporation,
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vs.

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK,
Respondents

The petition of the City of Richmond for a Writ of Certiorari directed to the Circuit Court of Appeals for the Fourth Circuit to bring before the Supreme Court the case of Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock, Petitioners, v. the City of Richmond, Respondent.

To the SUPREME COURT OF THE UNITED STATES OF AMERICA:

Your petitioner, the City of Richmond, a municipal corporation, duly organized under the laws of the Commonwealth of Virginia, respectfully prays that a Writ of Certiorari may be directed to the United States Circuit Court of Appeals for the Fourth Circuit to bring before the Supreme Court of the United States the case of *Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock, Petitioners*, v. *The City of Richmond, Respondent*, which was argued before the said Circuit Court of Appeals on November 15, 1916, on a petition to superintend and revise in matter of law proceedings in the

District Court of the United States for the Eastern District of Virginia at Richmond, In Bankruptcy, and was decided against your petitioner on the 14th day of March, 1917. Your petitioner respectfully shows to this Court the following summary of the matter involved, and the general reasons relied on for the allowance of the writ:

The Ainslie Carriage Company, a corporation doing business in the City of Richmond, became so involved financially that on November 4, 1909, receivers were appointed by the Chancery Court of the City of Richmond, on a petition filed for that purpose. At that time the Company was in default for the current year's City taxes, amounting to two hundred and ninety-four dollars ($294), bills for which were then in the hands of the City Collector who was vested with power to distrain, though the taxes might have been paid by the Company at any time prior to January 1, 1910, without having finally become delinquent. They would have finally become delinquent on February 1, 1910, when they would have been turned over to the Collector of Delinquent Taxes who was also vested with the power to distrain. This right to collect its taxes by distress was given the City by its charter and ordinances, without limitation as to time, and, therefore, continued until payment. At the time of the appointment of the receivers the Company was delinquent for the taxes for the year 1908, aggregating two hundred and ninety-four dollars ($294), and for the balance due for the taxes of the year 1907, aggregating one hundred and sixty-nine dollars ($169), bills for which were in the hands of the Collector of Delinquent Taxes to be collected by distress, or otherwise, as above stated. On November 6, 1909, a petition in involuntary bankruptcy was filed in the United States District Court for the Eastern District of Virginia, which was followed by an order of adjudication and reference on February 3, 1910. On February 1, 1910, which was the beginning of a new fiscal year for the City of Richmond, municipal taxes for the year 1910, aggregating $37.63, were assessed, to be paid under the ordinances of the City—one-half in June and the remainder on or before the 31st day of December, subject to a penalty of five per centum (5%) unless one-half was paid on or before the 30th day of June. The respondents admitted liability for

the taxes of 1910, and the Circuit Court of Appeals affirmed liability for that year, but neither the respondents nor the Circuit Court of Appeals allowed or admitted liability for the years 1907, 1908 and 1909—although 1909 was the current year in which the receivership occurred and the tax bills for that year were still in the hands of the City Collector, not having been yet declared delinquent and not having been yet turned over to the Collector of Delinquent Taxes, but being susceptible of payment by the Company to the Collector of Taxes at any time prior to January 1, 1910. The taxes for the years 1907 and 1908 were subject, in addition to the penalty of five per centum (5%), to an interest charge of six per centum (6%) from the time they came into the hands of the Collector of Delinquent Taxes, that being the requirement of the ordinances of the City. The reason given for refusing to allow the claim of the City for the taxes of 1907, 1908 and 1909, both by the Circuit Court of Appeals and by the respondents, was that on November 1, 1909—three days before the appointment of receivers—the respondents, as landlords of the Ainslie Carriage Company, levied a distress warrant upon the property of the Company for rent due as of that day, aggregating two thousand nine hundred and ninety-eight dollars and sixty-nine cents ($2,998.69). The rent year began on April 1, 1908, and the rental was at the rate of two thousand dollars ($2,000) per annum, so that the landlords had permitted their tenant to become delinquent for, approximately, seventeen months' rent. It is claimed by the respondents, and decided by the lower Court, that the City is deprived of its right to taxes for the years 1907, 1908 and 1909 upon the ground of laches on the part of its officers, notwithstanding the continued right to distrain on its part and although for the year 1909 the Collector of Taxes' right to distrain had existed for only two months—having begun on September 1st of that year. It is also insisted by the respondents that the levy of the landlord's distress warrant gave him a lien which supplanted the inchoate lien of the City for its taxes.

The landlord's right to distrain is given by sections 2787, 2790 and 2791 of the Code of Virginia, subject to the pro-

visions of section 2792. The first two sections give the right of distress within five years from the time the rent becomes due. The third authorizes it to be levied on any goods of the lessee or his assignee or under tenant, found on the premises, or which may have been removed therefrom not more than thirty days; with provisions subordinating the landlord to a valid lien existing at the time the goods and chattels of the lessee were carried on the premises and confining him to not more than one year's rent if the lien were created while the goods were on the leased premises, whether the rent accrued before or after the creation of the lien. Section 2791 of the Code of Virginia having prescribed on what goods the landlord might levy, viz., those found on the premises or removed therefrom not more than thirty days, section 2792 of the Code, so far as pertinent, provides: "Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines." The right of the landlord to distrain is thus made expressly subject to "any lien for taxes," and it is submitted that the lien thus referred to is the inchoate lien arising out of the liability to distress. That this provision of section 2792 of the Code of Virginia did refer to the inchoate lien for taxes was conceded in the Court below, and necessarily follows from the fact that the statutes give no express lien, and unless reference is had to the inchoate lien the provision is wholly unnecessary. It would be an entirely useless provision if meant to apply only to a case where an actual distress for taxes had been made, since priority for the taxes would have been already thereby established. Besides, section 622 of the Code of Virginia provides:

> "Any goods or chattels in the corporation or county belonging to the person or estate assessed with taxes or levies may be distrained therefor by the treasurer, sheriff, sergeant, constable or collector. In all cases, property subject to levy or distress for taxes shall be liable to levy or distress in the hands of any person, for taxes thereon."

The word "levies" has always been used in Virginia to signify local taxes, as distinguished from state taxes.

Similarly, the charter of the City of Richmond, section 73, provides:

> "All goods and chattels, wheresoever found, may be distrained and sold for taxes assessed and due thereon, and no deed of trust or mortgage upon goods and chattels shall prevent the same being distrained and sold for taxes assessed against the grantor in such deed, while such goods and chattels remain in the grantor's possession, nor shall any such deed prevent the goods and chattels conveyed from being distrained and sold for taxes thereon, no matter in whose possession they may be found."

Section 51 of the City Charter also provides:

> "It shall be the duty of the said collector (of taxes) on the first Monday in February of each year to turn over to the Auditor of the City all bills, assessments and accounts for all preceding years, upon which there shall then remain unpaid any part of any tax or assessment due the City, and thereupon the City Auditor shall turn over the same to the officer of the City who shall be chosen by the City Council and known as the collector of delinquent taxes * * * the said collector of delinquent taxes shall have the same power to collect by the same means and processes all bills, assessments and accounts delivered to him as are conferred by the City Charter upon the collector of taxes."

In conformity with these charter sections, Chapter 16, Richmond City Code, 1910, and especially sections 3-6-7-8-10-11-20 and 22, which are in all essential respects identical with the same sections of Chapter 14, Richmond City Code, 1899, were enacted, vesting the collector of taxes with power to distrain. These ordinance provisions, as far as pertinent, are as follows:

> "(3). The Collector shall annually give notice in at least three of the daily newspapers of the city, for

fifteen days prior to the fifteenth day of June, that he will attend at his office daily, between the hours nine o'clock A. M. and six o'clock P. M. from the fifteenth to the thirtieth of June, inclusive, for the purpose of receiving from any person charged with city taxes, the whole or one-half of the amount of tax charged; and that five per centum will be added to the whole amount of tax charged in every case where the party assessed shall fail to pay the whole or one-half, within the time so limited. Whenever any person shall fail to pay on or before the said thirtieth of June of each year, the whole or one-half of the amount of tax charged against him or her, there shall be added five per centum upon the whole amount of the tax so remaining due. The collector shall, in like manner, give notice for fifteen days prior to the fifteenth day of December, that he will attend at his office daily, between the above-mentioned hours, from the fifteenth to the thirty-first day of December, inclusive, for the purpose of receiving from any person who has alrady paid one-half only of the city taxes charged to him, the remaining half; and that five per centum will be added to the amount of said remaining half of the tax charged, in every case where the party assessed shall fail to pay the said remaining half within the time so limited. When any person shall have paid, on or before the thirtieth of June, one-half of the tax charged for that year, but shall fail to pay, on or before the said thirty-first day of December of each year, the remaining half of said tax, there shall be added five per centum upon the amount of the half so remaining due."

"(6). The collector shall proceed to collect all of the taxes assessed * * * as long as the same are allowed by the City Charter, and by the ordinances of the City, to remain in his hands for collection."

"(7). If all taxes with which any person * * * is assessed be not paid before the 1st day of September, the collector shall distrain, except where one-half thereof has been paid, under the third section, * * *.

"(8). Any goods or chattels in the City belonging to the person or estate assessed with taxes may be distrained therefor."

"(10). No deed of trust or mortgage upon goods or chattels shall prevent the same from being distrained or sold for taxes assessed against the grantor in such deed, whilst such goods and chattels remain in the grantor's possession, nor shall any such deed prevent the goods and chattels conveyed from being distrained and sold for taxes thereon, no matter in whose possession they may be found."

"(11). Where the collector or the collector of delinquent taxes, as the case may be, cannot find sufficient goods and chattels to distrain for taxes, any person indebted to or having in his hands estate of the party assessed with such taxes may be applied to for payment thereof out of such debt or estate and a payment by such person of the said taxes, either in whole or in part, shall entitle him to a charge or credit for so much on account of such debt or estate against the party so assessed. If the person applied to do not pay so much as it may seem to the officer ought to be recovered on account of the debt or estate in his hands, the officer shall * * * procure from the Police Justice a summons * * * and from the time of the service of any such summons the said taxes shall constitute a lien on the debt so due from such person, or on the said estate in his hands."

"(20). If there be good cause to believe that a person assessed with taxes, not owning real estate, intends to remove his property out of the City, or to sell out or close his business therein, the collector may, unless such taxes be paid on demand, distrain therefor, although the 1st day of September may not have arrived, and although one-half thereof may have been paid."

"(22). * * * It shall be the duty of the said collector * * * on the first Monday in February of

each year to turn over to the Auditor of the City all bills, assessments and accounts for all preceding years upon which there shall then remain unpaid any part of any tax or assessment due the City, and thereupon the said auditor shall turn over the same to the collector of delinquent taxes who shall proceed to collect the same * * * and who shall have the same power to collect, by the same methods and processes, all tax bills, assessments and accounts delivered to him as are conferred by the charter and the ordinances of the City upon the collector of the City taxes."

It is thus apparent that the City of Richmond is given an unlimited lien for its taxes, by necessary implication if not by express provision, and the rights of the landlord being limited by V. C. Section 2792, Supra, he can distrain for rent only subject to the rights of the City.

The case, having been thus summarily stated, it is urged that the Writ of Certiorari asked for should be directed for the following general reasons:

1. The general rule of equity in such cases is thus stated in 2 Cooley on Taxation, 3rd Ed., p. 834:

> "The Court having in its charge or under its control a fund or other property upon which taxes are due will, as a representative of the sovereignity, direct them to be paid without raising any question of the means of enforcement by process and before all other claims excepting judicial costs. Thus, upon proper application and suitable proof, a receiver will be ordered to satisfy a tax assessed against the property in his hands and a like direction will be made in other cases where funds are held subject to the order of a Court."

This principle is affirmed by Chief Justice Fuller in the case of *in re Tyler*, 149 U. S. 184, where he quotes with approval from *Greeley* v. *Provident Savings Bank*, 98 Mo. 458-460:

"The amount of the taxes was undisputed and the receiver had in his hands sufficient funds to pay them and we think the order should have been made. It may be conceded that the State would not have an express lien upon the assets that entered the hands of the receiver, but it had a right paramount to other creditors to be paid out of those assets * * * a right which it could have enforced through its Revenue Officer by the summary process of distress * * * but for the fact that the property and assets of its debtor had passed into the custody of its courts whose duty it was, in the administration and distribution of those assets, to respect that paramount right, upon the untrammelled assertion of which depends the power to protect the very fund being distributed and to maintain the existence of the tribunal engaged in distributing it; and to make no order for the *distribution* of assets in *custodia legis* except in subordination to that right. The ordinary revenue officers of the state being deprived of the ordinary means of securing the state's revenue from the fund in the custody of the court, the duty devolved upon the court to be satisfied and upon the receiver to see that the taxes due the state were paid before the estate was *distributed* to other creditors; and we can conceive of no scheme of administration that the court could properly adopt by which the state's demand could be reduced to the level of an ordinary debt and be cut off unless presented to the court for allowance within a given time."

The fact that the property is in the custody of the Court "does not," says Chief Justice Fuller, "involve interruption in the payment of taxes or the displacement or impairment of the lien therefor, but on the contrary it makes it the imperative duty of the court to recognize as paramount and enforce with promptness and vigor the just claims of the authorities for the prescribed contributions to state and municipal revenue."

These principles are recognized and approved by Whittle, J., in the case of *Taylor* v. *Sutherlin-Meade Co.*, 107 Va. 797,

holding: "It is the universal rule that a court, as the representative of the sovereignity of the state, will make no order for the distribution of funds in *custodia legis* until provision is made for payment of taxes and levies due to the Commonwealth and its municipalities," citing *Alderson on Receivers*, p. 205; *Bank* v. *Ewing* (C. C. A.), 103 Fed. 168, and other cases. Indeed, in Virginia, we have a statute—Pollard's Code, Sec. 492 (b), Acts of Assembly 1897-98, p. 824—which provides as follows:

> "No decree or order shall be entered by any court of the Commonwealth directing the payment, *distribution or other distribution*, of any funds, securities, monies, or other property under its control, or under the control or in the hands of any receiver, commissioner, or other officer of the court, or any executor, administrator, trustee, or other fiduciary, unless it shall be made to appear to such court that *all taxes and levies* upon such funds, securities, monies, or other property, have been paid, or unless the payment thereof be provided for in such decree or order, and no commissioner, executor, administrator, trustee, or other fiduciary, receiver, trustee or bank, or other person or corporation shall pay out any funds in hand under the order of any court unless a receipt for the taxes is produced showing said taxes to have been paid, or unless such order shall so state."

See also Acts of Assembly, 1910, p. 96, Ch. 65. This Act of Assembly is similar to the Act of Congress, Rev. Stat. U. S., Sec. 3466, which requires that debts due to the United States shall be first satisfied, or, more strictly, to the provision in the Bankrupt Act of 1867, which gives priority of payment to all debts due to the United States and all taxes and assessments under the laws thereof, or to the state in which the proceedings were pending.

2. Section 64 (a) of the Bankrupt Act enacts this principle into the bankrupt law, over-riding any state law to the contrary, and places the state, county and municipality upon

the same footing as that of the United States itself. Taxes, whether a lien or not, are to be paid before any distribution is to be made to creditors.

New Jersey v. *Anderson*, 203 U. S. 483.
Collier on Bankruptcy, p. 889-892. 5th Ed. pp. 498-499.
Re Prince and Walter, 131 Fed. 546.
Re Tilden, 91 Fed. 500.
Re Tebo, 101 Fed. 419.
Re Heilberg, 96 A. B. R. 714.
Re Crammond, 145 Fed. 966.
Yoke Vitrified Brick Co., 180 Fed. 235 (Conclusion of Opinion).
Loveland on Bankruptcy, 3rd Ed., Sec. 276 (a), p. 769.
Remington on Bankruptcy, Sec. 703, p. 423 and 1322.

3. Since the decision of the case at bar must apply to the United States itself, in a similar case, the revenues of the city, state and nation may properly be said to be involved, and it thus presents a question of gravity.

4. The decision of the United States Circuit Court of Appeals for the Fourth Circuit, which this petition asks to have reviewed, is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit, in the case of *Waco* v. *Bryan*, 62 C. C. A. 79, 127 Fed. 79; and in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Chattanooga* v. *Hill*, 71 C. C. A. 584, 137 Fed. 600. It is, we think, also in conflict with the decision of this Court in *New Jersey* v. *Anderson*, 203 U. S. 483, and with the case of *Dayton* v. *Stanard*, decided June 12, 1916, and reported in the S. C. R., Vol. 36, No. 16, p. 695, in which case a certiorari was granted on April 12, 1915.

Dayton v. *Stanard*, 238 U. S. 1493.
In re Tyler, 149 U. S. 184.
Swartz v. *Hammer*, 194 U. S. 441.
Hecox v. *Teller*, 198 Fed. 636.

5. The writ should issue because of the difference of opinion between the different Circuit Courts of Appeal, and in the interest of uniformity of decisions.

Columbus Watch v. *Robins*, 148 U. S. 266.
In re Woods, 143 U. S. 202-206.
Chicago, &c., R. Co. v. *Osborne*, 146 U. S. 354.
Forsythe v. *Hammond*, 166 U. S. 506.

6. The writ should issue because, under the state and municipal laws, the right of the sovereign to its taxes is superior to the right of a mere contract creditor. "Imperative necessity has forced a distinction between such claims (taxes), and all others."

V. C. Secs. 2791 *and* 2792.
Murray's Lessee, et als, v. *Hoboken Land Co.*, 18 Howard, 272-282.

7. The writ should issue because the Court below was in error in its definition of the word "dividends," contained in Section 64 (a) of the Bankrupt Act, and was in error in holding that laches on the part of the municipal officers could defeat the right of the municipality to its taxes and subordinate its lien to that of a landlord.

In re Barber, 97 Fed. 547.
In re Weissman, 178 Fed. 115.
In re Fisher, 148 Fed. 907.
Dillon on Mun. Corp., Vol. 4, Sec. 1414.
Powell v. *Richmond*, 94 Va. 79.

8. The Court below was in error in holding that the words "taxes due thereon" confined the lien of the city for its taxes to the identical shifting stock of goods of a merchant on which, or on the basis of which, the assessment for the current year was actually made. If this were so, it must also be held that "each article of property was subject to be sold only to the extent of the amount of taxes assessed upon it,

and would lead to great perplexity and confusion. The language "due thereon" applies to the collector's books, and not to the assessment of the property assessed. The legislature intended to bind all of the personal property in the hands of the tax payer from the time the collector received his warrant until it is paid." In this connection it will be remembered that Section 8 of Chapter 14, Richmond City Code, 1899 and 1910, provides that "any goods or chattels in the City belonging to the person or estate assessed with taxes may be distrained therefor."

Hill v. *Figley*, 23 Ill. 418-420.
27 *Am. & Eng. Enc. of Law*, 739, and cases cited.

9. The case of *Jackson Coal Co.* v. *Phillips Line*, 114 Va. 40, is not binding in the case at bar because the Charter of the City of Richmond does not contain the limitation said to be contained in the Charter of the City of Petersburg. The case of *New Jersey* v. *Lovell*, 179 Fed. 321, which is relied on by the lower Court, expressly avoids deciding the point here in question. It does decide that taxes are not prior to "the actual and necessary cost of preserving the estate." The case of *Mills* v. *Virginia-Carolina Lumber Co.*, 164 Fed. 168, also relied on by the lower Court, prefers a lien creditor to "the costs of general administration of the bankrupt's estate." Both these decisions, as applied to the case at bar, seem in conflict with *New Jersey* v. *Anderson*, 203 U. S. 483; *Waco* v. *Bryan*; *Hecox* v. *Teller*, and *Chattanooga* v. *Hill*, *supra*. In the Lovell case the reasons given for the point actually decided are not contained in the quotation made by the lower Court in its opinion. These reasons are that taxes, if given precedence to the cost of preserving the estate, might "absorb the whole fund and leave unpaid the agency by which its payment was effective." The case of *Mills* v. *Virginia-Carolina Lumber Co.* endorses without reserve the reverse principle, *i. e.*, that lien creditors, though asserting their rights in bankruptcy proceedings, were entitled to be paid in full, notwithstanding the fact that the payment of the debt and interest consumed the entire proceeds, even to the exclusion of the

costs of the general administration. This latter holding is contrary to the principle of the Lovell case, and in direct conflict with *re Tebo*, 101 Fed. 419, and the writ prayed for should be granted, notwithstanding these cases.

For these reasons your petitioner prays that this Honorable Court will be pleased to grant a Writ of Certiorari in this case to the Circuit Court of Appeals for the Fourth Circuit, to bring up this case to this Honorable Court for such proceedings therein as to this Honorable Court may seem just.

THE CITY OF RICHMOND,
GEORGE AINSLIE, *Mayor.*

GEORGE WAYNE ANDERSON,
Assistant City Attorney.

STATE OF VIRGINIA,
CITY OF RICHMOND,
To-wit:

I, RICHMOND T. LACY, JR., a Notary Public in and for the state and city aforesaid, do certify that GEORGE AINSLIE, Mayor of the City of Richmond, personally appeared and made oath before me in my said city that the facts stated in the foregoing petition are true to the best of his knowledge, information and belief.

Given under my hand this 14th day of May, 1917.

RICHMOND T. LACY, JR.,
Notary Public.

I hereby certify that I have examined the foregoing petition and in my opinion the petition is well founded and the case is one in which the prayer of the petitioner should be granted.

GEORGE WAYNE ANDERSON,
Counsel for Petitioner.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

In the matter of the petition of the City of Richmond, a municipal corporation, for a Writ of Certiorari directed to the Circuit Court of Appeals of the United States, for the Fourth Circuit, to bring before the Supreme Court of the United States the case of *Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock* v. *the City of Richmond.*

To JAMES E. CANNON, ESQ.,

Counsel for Elizabeth W. Bird, Loulie W. Nolting, and Charles E. Whitlock.

SIR:—

Please take notice that upon a certified copy of the transcript of the record herein and upon the annexed petition of the City of Richmond, a municipal corporation, sworn to by the Mayor of the said City on the 14th day of May, 1917, I shall make the motion hereto annexed before the Supreme Court of the United States at the Capitol in the City of Washington, D. C., on Monday, the 4th day of June, 1917, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, and that I shall then and there move for such further relief in the premises as may be just.

Dated at Richmond, Virginia, this 21st day of May, 1917.

Yours truly,

GEORGE WAYNE ANDERSON,
Assistant City Attorney, and
Counsel for Petitioner.

I acknowledge service of the foregoing notice, together with a copy of the petition and brief in this case on this the 21st day of May, 1917.

JAMES E. CANNON,
Counsel for Elizabeth W. Bird,
Loulie W. Nolting, and
Charles E. Whitlock.

IN THE SUPREME COURT OF THE UNITED STATES OF AMERICA.

In the matter of the petition of the City of Richmond, a municipal corporation, for a Writ of Certiorari directed to the Circuit Court of Appeals of the United States, for the Fourth Circuit, to bring before the Supreme Court of the United States the case of *Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock* v. *the City of Richmond*,

And now comes the petitioner above named by GEORGE WAYNE ANDERSON, Esquire, Assistant City Attorney, its counsel, attorney and proctor, and moves this Court upon a transcript of the record herein and upon the annexed petition, sworn to on the 14th day of May, 1917, for a Writ of Certiorari directed to the Circuit Court of Appeals of the United States, for the Fourth Circuit, and to the District Court of the United States for the Eastern District of Virginia, to bring before this Honorable Court the case of *Elizabeth W. Bird, Loulie W. Nolting and Charles E. Whitlock, Petitioners*, v. *the City of Richmond, Respondent*, recently decided by the Circuit Court of Appeals of the United States, for the Fourth Circuit, and by the District Court of the United States for the Eastern District of Virginia, for such proceedings therein as to this Court may seem just, and for such other and further relief in the premises as may be just.

-9-

OFFICE SUPREME COURT, U. S.
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No. 1[redacted]5[redacted]195

IN THE

Supreme Court of the United States

The CITY OF RICHMOND, a municipal corporation,
Petitioner

vs.

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK,
Respondents

On a petition for a Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit

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BRIEF FOR THE PETITIONER

GEORGE WAYNE ANDERSON,
Assistant City Attorney.

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IN THE

Supreme Court of the United States

The CITY OF RICHMOND, a municipal corporation,
Petitioner

vs.

ELIZABETH W. BIRD, LOULIE W. NOLTING, and CHARLES E. WHITLOCK,
Respondents

On a petition for a Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit

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Brief for the Petitioner

In the Circuit Court of Appeals of the United States, for the Fourth Circuit, the City of Richmond filed a brief which covers the points involved in this petition so fully, that leave is respectfully asked to file the brief there used in support of this petition. It will appear that the contest here is between the sovereign claiming taxes and the landlord claiming rent. Your petitioner claims taxes due from the Ainslie Carriage Company, Inc., a Bankrupt, for the years 1907-1908-1909 and 1910, aggregating seven hundred and ninety-four dollars and sixty-three cents ($794.63), exclusive of interest and penalties. The respondents were the landlords of the bankrupt and on November 1, 1909, levied a distress warrant upon the goods and chattels of the Company for the sum of two thousand nine hundred and ninety-eight dollars and sixty-nine cents ($2,998.69). The rent year began April 1, 1908, and the rental was at the rate of two thousand dollars ($2,000.00) per annum. On

November 4, 1909, receivers were appointed for the Ainslie Carriage Company by the Chancery Court of the City of Richmond, on a petition filed on the preceding day, and on February 3, 1910, the Company was adjudged a bankrupt in involuntary bankruptcy proceedings, filed on November 6, 1909, in the United States District Court for the Eastern District of Virginia. At the time of the receivership—November 4, 1909,—the City of Richmond had not distrained for the taxes due for any of the years named and, of course, could not do so after that date on account of the Court proceedings. The question, therefore, is whether the landlord by his distress levy for rent takes precedence over the right of the City to its taxes. In the District Court of the United States for the Eastern District of Virginia the decision was in favor of the City of Richmond, but the Circuit Court of Appeals—Woods, J., dissenting—reversed the District Court and held in favor of the landlord.

ERRORS RELIED UPON.

1. The Circuit Court of Appeals erred in supposing that the petitioner relied upon Section 67 (f) of the Bankrupt Act, which forbids the acquisition of liens within four (4) months of the filing of a petition in bankruptcy. The point was incidentally mentioned on page 22 of the original brief as being a question upon which the courts were divided. It had no real part in the argument addressed to the Court and yet, approximately, one-half of the opinion deals with this question on which no reliance was placed by your petitioner.

2. The Court erred in holding that Section 64 (a) of the Bankrupt Act did not require the payment of the taxes due in this case in preference to the landlord's rent.

3. The Court erred in its interpretation of the word "dividends" in Section 64 (a) of the Bankrupt Act.

4. The Court erred in holding that the City was not given a lien by state and municipal laws superior to that of the landlord.

5. The Court erred in holding that the lien given

the City by state and municipal laws was limited to the indentical goods and chattels assessed, instead of being binding upon all the personal property in the possession of the taxpayer.

6. The Court erred in holding that the City lost any of its rights by reason of the laches of its officers.

7. The Court erred in holding that the case of *Jackson Coal Co.* v. *Phillips Line,* 114 Va. 40, was binding upon it and conclusive of the case at bar.

8. The Court erred in refusing to allow recovery of the taxes due for the year 1909, while allowing those for the year 1910; whatever may be true of its decision in refusing to allow the taxes due for the years 1907 and 1908.

CASE ARGUED.

The Court is respectfully referred to the argument set out in the brief filed in the Circuit Court of Appeals, which is attached hereto, for the main reasons supporting the petition, but leave is asked to add thereto by making the following observations:

In the argument in the Court below the claim of the City to a lien for its taxes was not always borne in mind by counsel, nor indeed by the Court itself. It is true that the landlord is given a right by V. C. 2791 to distrain for rent due, on any goods of the lessee, or his assignee, or undertenant, found on the premises, but it is also true that this right is limited by Section 2792 of the Code of Virginia, which provides that: "neither this nor the preceding section shall affect any lien for taxes, levies or militia fines." It was admitted in argument that the lien here referred to was an inchoate or an implied lien and, indeed, this must be so, else the state—which cannot levy until June 15th in any year—and the City—which cannot levy until September 1st in any year—would always be defeated of taxes by any creditor perfecting a lien for his ordinary debt prior to those dates. That the lien thus mentioned is an inchoate or an implied lien is conclusively established by the fact that no express lien is given by any statute for taxes assessed against personal property

to either the City or the state. It was also admitted in argument that the tax for 1910 must be paid, although it was not assessed until after the landlord's levy of November 1, 1909, and although no levy could be made by the City until September 1, 1910. In other words, the respondents claim that the taxes of 1907, 1908 and 1909 should not be paid because no levy was made, and yet admit that the tax of 1910 must be paid, although no levy could be made. That the tax for 1910 must be paid is undoubtedly the law, but the reason for it is destructive of the respondents' contention in this case. If it be true, as it is true, that taxes assessed against property in the hands of the Court must be paid, although not supported by a perfect lien, in preference to the landlord's distress levy for rent, made prior to the assessment, then it must be true that the inchoate lien for taxes takes precedence over any rent lien, whether perfected before or after the assessment.

It was also admitted in argument that the right of the City of Richmond to distrain for its taxes was unlimited and continuous as to time, and the Court so states on page three of the opinion complained of. The only limitation urged, and enforced by the Court, was that the right to levy—given the City of Richmond by its charter—was limited to the identical goods and chattels assessed with the taxes, and for the taxes due thereon. This contention was upheld by the Court, notwithstanding the provisions of the City ordinances, Section 8 of Chapter 14, providing that "any goods or chattels in the City, belonging to the person or estate assessed with taxes, may be distrained therefor," and notwithstanding the provisions of Section 622 of the Code of Virginia—under which the City had a right to act, as well as under its charter—that "any goods or chattels in the corporation or county belonging to the person or estate assessed with taxes or levies may be distrained therefor by the treasurer, sheriff, sergeant, constable or collector." If this were true, it must also be held that each article of property was subject to be sold only to the extent of the amount of taxes assessed

upon it and would lead to great perplexity and confusion. "The Legislature intended to bind all of the personal property in the hands of the taxpayer from the time the collector received his warrant until it is paid."

Hill v. *Figley*, 23 Ill. 418-428.

27 *Am. & Eng. Enc. of Law*, p. 739, and cases cited.

In regard to the true intent and meaning of Section 64 (a) of the Bankrupt Act, reliance is placed on the argument used in the original brief. It will be remarked here, however, that this is the only provision relating to the payment of taxes contained in the Bankrupt Act and that, since the United States is placed upon the same footing as the state and City, unless this provision contemplates the payment of taxes prior to all other claims, and whether the taxes be a lien or charge upon the property or not, both the United States and the state and City would lose their taxes in every case in which a landlord, or any other lienor, perfected his lien before the agents of the government took steps to enforce the payment of the taxes due. Thus, the right to public revenues would be made subordinate to contract debts, and depend upon the prompt action of the government agents. The law, however, is that the doctrines of waiver, laches and estoppel cannot be invoked against the sovereign unless by its consent, and in this case there is no such consent. Section 64 (a) of the Bankrupt Act does not order that the trustee shall pay taxes for which liens have been perfected, but that he shall pay all taxes legally due and owing, and the case of *New Jersey* v. *Anderson*, 203 U. S. 489, determines that such taxes are legally due and owing as of the date of assessment. It also holds that such taxes must be paid, although there is no property in the state assessing the taxes and, therefore, no lien upon the property for the tax. This case likewise distinguishes between taxes and debts, holding that taxes are imposts levied for the support of the government, whereas debts are obligations founded on contract. It is, therefore, contended

that the Bankrupt Act itself contemplates the payment of taxes, regardless of their being a lien upon the property, in preference to all contract debts, whether supported by lien or not. In this connection, great reliance is placed by the respondents upon Section 67 (d) of the Bankrupt Act, to which reply is made that this section preserves, and intends to preserve, liens as against all contract creditors, but does not intend to subordinate the imposts levied for the support of the government to a contract debt, nor to encourage a race of diligence between such contract creditors and the agents of the government, charged with the duty of collecting such imposts. And, secondly, reply is made that by virtue of V. C. 2792 and V. C. 622, as well as by virtue of the sections of the charter and City ordinances cited in the original brief, the City does have a lien for its taxes and the lien of the landland is expressly made subordinate thereto by V. C. 2792. In the third place, if the construction of Section 67 (d) contended for by the respondents is to prevail, any contract creditor perfecting a lien will supplant the government, national and local, and subordinate its claims to the revenues necessary for the support of government, unless a perfect lien therefor has been previously obtained. Although it is contended by your petitioner that this is not the true intent of Section 67 (d), it is again insisted that in this case, under the state and municipal laws just referred to, the City does have a lien wihch is superior to that of the landlord.

The lien thus given cannot be lost by laches on the part of the municipal officers in the absence of any statute to that effect. In the case of *re Weissman*, 178 Fed. 115, taxes for twelve (12) years were allowed. In this case the respondents herein cited the referee's statement, which the Court reversed. In *Bank* v. *Ewing*, 103 Fed. 168, taxes, interest, penalties, and costs were allowed for the yeaars 1895, 1896, 1897 and 1898. In *re Stalker*, 123 Fed. 961, city taxes were allowed for the years 1893 to 1901, inclusive, except 1897 and 1899. In *Waco* v. *Bryan*, 127 Fed. 80, taxes were allowed for the years 1897 to

1902, inclusive. In this case, contrary to respondents' brief in the Court below, the Court refused to allow a lien and only part of the realty was sold prior to the bankruptcy proceeding. The quotation made by the respondents was from the dissenting opinion. In the Stalker case there was a statute of limitations, which is not true in the case at bar and, indeed, such a statute is contrary to Section 174 of the State Constitution, which provides that: "after this constitution shall be in force no statute of limitations shall run against any claim of the state for taxes upon any property." Besides, the Court held that the taxes should be paid, except in cases of property sold on mortgage subject to taxes. *In Powell's Executor* v. *Richmond,* 94 Va. 79, taxes were allowed for the years 1876 to 1881, inclusive, and 1888 to 1892, inclusive. This case likewise held that the City of Richmond had an unlimited lien for its taxes upon real estate, although the state lien was limited by statute to a period of five (5) years; and a like argument is made for the unlimited lien of the City of Richmond in regard to its lien for personal taxes. In *Marye* v. *Diggs,* 98 Va. 749, which was cited and relied on by respondents, taxes were recovered from 1876 to 1894, inclusive, and, although it is true that the Court then held that neither the state nor the county could maintain an independent suit in chancery to enforce the tax lien, this decision brought about an amendment of the statute on February 14, 1901, since which time Section 456 of the Code of Virginia, after providing for an express lien on real estate for taxes and levies, provides: "which lien, in addition to existing remedies for the collection of taxes and levies, shall be enforcable by suit in equity." The case of *Greeley* v. *Provident Savings Bank,* 98 Mo. 458, quoted by Chief Justice Fuller in *Re Tyler,* 149 U. S. 184, says nothing as to liens being involved, but it reverses the lower Court which refused payment of taxes because of the collector's failure to intervene within the time prescribed by the Court, thus holding that the collector's laches could not defeat the sovereign of its revenues.

Leave is respectfully asked to notice at this point the criticisms made by the respondents in the argument in the Court below of certain cases cited by your petitioner; and it is first noted that respondents did not concede the 1910 tax until the argument in the Circuit Court of Appeals. In *Hecox* v. *Teller,* 198 Fed. 636, the property on which the tax was levied was mortgaged so heavily that it had been relinquished by the trustee to the mortgagee, yet the Court held that the tax must be paid out of the bankrupts estate. In *re Keller,* 109 Fed. 131, the stock of goods was assessed after the adjudication and was sold free and clear of all liens. As a result, the tax claims were transferred to the proceeds of sale, and it was held that they must be paid. In the case of the *Yoke Vitrified Brick Co.,* 180 Fed. 235, also relied upon by the respondents, it will be found that the Court, on page 239, concludes its opinion by saying:

> "Anything inhering in the general principle of equity or the law such, for example, as the duty of the property to contribute its just proportion of the expenses of government, or *pro rata* of the expenses of the preservation of the estate, and such like matters, remain still enforcable against the estate, althought covered by fixed liens. This point was decided in *In re Crammond,* 145 Fed. 966."

In *Chattanooga* v. *Hill,* 71 C. C. A. 584, Sixth Circuit, it was held that all taxes legally due and owing must be paid out of the assets, although only fifteen per centum (15%) thereof came from property not covered by a mortgage and although the taxes aggregated more than fifteen per centum. In *re Kallak,* 147 Fed. 276, it was contended that taxes are a claim, to be paid with other claims in the ordinary course of administration, but the Court held that taxes do not constitute a claim in bankruptcy and to the question: "What ought to be paid under Section 64 (a) of the Bankrupt Act?", the answer was in the words of the Act itself: "All taxes legally due and owing." In *re Prince and Walter,* 131 Fed. 546, the citation of which

respondents criticised, sale was made subject to the first mortgage only which, of course, was a sale free of tax liens and thereupon the second mortgagee claimed the proceeds of sale. The claim seems to have been allowed, but the taaxes due on the real estate so sold were paid out of the personal fund. It was, therefore, a case of marshalling of assets, the mortgagee being given the benefit of the fund on which alone he had a claim, and the taxes being paid out of the personal fund which was also subject to them. It is true the Court quoted Section 67 (d) of the Bankrupt Act, which, however, would merely emphasize the priority of the tax claim if it were a lien, as is the case here.

Having thus referred to some of the cases cited by your petitioner, and criticised in the Court below by the respondents, your petitioner now respectfully asks the Court to consider the attached brief as a part of its brief in this Court.

In the United States Circuit Court of Appeals

FOURTH CIRCUIT

ELIZABETH W. BIRD,
LOULIE W. NOLTING, AND
CHARLES E. WHITLOCK,
} Petitioners

vs

CITY OF RICHMOND, Respondent.

On petition to superintend and revise in matter of law proceedings of the District Court of the United States for the Eastern District of Virginia at Richmond. In bankruptcy.

BRIEF OF THE CITY OF RICHMOND.

This contest is between the city of Richmond, claiming taxes legally due and owing by the Ainslie Carriage Company, bankrupt, and the petitioners, claiming rent due by the bankrupt. The tax claim is for balance due for the year 1907, $169; for the year 1908, $294; for the year 1909, $294; for the year 1910, $37.63; a total tax claim of $794.63. The landlord's claim is for rent due for the year beginning April 1, 1908, at a rental of $2,000 per annum and aggregating $2,998.69, as of November 1, 1909. On that day the landlord levied a distress warrant for that amount and on the same day levied attachments aggregating $833.33 for rent, to become due up to April 1, 1910. On November 3, 1909, a pe-

tition was filed in the chancery court of the city of Richmond for the appointment of receivers for the company, and they were appointed on November 4, 1909. On November 6, 1909, a petition in involuntary bankruptcy was filed in the United States District Court for the Eastern District of Virginia, which was followed by an order of adjudication and reference on February 3, 1910.

The fiscal year of the City of Richmond begins on February 1 of each year (Richmond City Code, 1910, chapter 13, section 8), and it will be seen from the citations to the charter and ordinances of the City that it is vested with the right to distrain for its taxes without limitation as to time and that both the collector of taxes and the collector of delinquent taxes were invested with that power.

CASE ARGUED.

It will be contended in this brief, first, that the City of Richmond is entitled to priority over the landlord for the taxes legally due and owing by virtue of the Bankrupt Act, Section 64 (a) and, second, that nothing in the State law affects or can affect the priority thus given. Taking up the first proposition, Section 64 (a) reads as follows: "The court shall order the trustee to pay all taxes legally due and owing to the United States—State, County, District or Municipality—in advance of the payment of dividends to creditors." Unless there can be found elsewhere in the act language which will control this provision, it is conclusive of the case at bar and we do not think such language can be found.

The contest here is between the local sovereign claiming its revenues and a creditor claiming a debt. As was said in *Murrays' Lessee, at als* v. *Hoboken Land Co.*, 18 Howard 272-282: "Imperative necessity has forced a distinction between such claims (taxes) and all others." This principle, we think, is the foundation of Section 64 (a) of the Bankrupt Act and leads to its proper interpretation. As Judge Cooley states in his second volume on taxation, 3rd Ed., p. 834; taxes should "be paid without raising any question of the means of enforcement by process and before all other claims

excepting judicial costs." This contention is supported both by text writers and by the courts. Thus, Collier on Bankruptcy, p. 889, says: "Construed strictly, the words of subdivision (a) section 64, result that taxes must be paid in any event, even if the property on which the taxes are assessed never came into the possession of the trustee. The courts will not favor an evasion by too literal a construction." The same author, at page 891, further says: "If the taxes are legally due and owing they must be paid, although long overdue;" citing

In *re* Weissman, 178 Fed. 115, where it was held that the "taxes must be paid as a prior claim," although there had been gross laxness on the part of the collector—the taxes having remained unpaid for a period of twelve years—and although their payment would take a large part or all of the money otherwise payable to creditors. It must be remembered that taxes are not debts and that the City and State are not creditors and, indeed, that the taxes need not be proved but must be paid as a duty by the trustee whether prove dor not. In *re* Fisher 148, Fed. 907. Fourth Dillon Municipal Corporations, section 1414. Remington Bankruptcy, Sec. 703, p. 423. Mr. Collier sums his examination of the authorities and his consideration of the true construction of Section 64 (a) at page 892, saying: "The weight of authority seems to sustain the view that the taxes, whether a lien or not, are to be paid before any *distribution* is to be made to creditors;" citing

In *re* Hollenfeldts 94 Fed. 629; in *re* Heilberg 6 A. B. R., 714; *New Jersey* v. *Anderson*, 203 U. S. 483.

He also declares at page 895 that taxes "assessed prior to adjudication are legally due and owing on the day of assessment, although not payable until after adjudication;" citing In *re* Flynn 134 Fed. 145; *New Jersey* v. *Anderson*, 203 U. S., 483, and further declares that taxes which the trustee is required to pay carry interest until paid, the reason against allowing interest in ordinary cases having no application in the case of public taxes. In *re* Kallak 147 Fed. 276; in *re* Schuyler 21 A. B. R. 428.

Remington on Bankruptcy, Vol. 1, p. 1319, *et sequa*, says:

> "It is incorrect to say as is said in *re* Veitch 4 A. B. R. 112, that taxes come under section 64 (b) (5) in the order of priority. On the contrary, Section 64 (a) specifies a distinct order of priority. It would be deprived of all meaning if taxes were comprehended within Section 64 (b) (5). In *re* Stalker 10 A. B. R. 713-123 Fed. 961: The significance of Section 64 (a) is that a claim for taxes is paramount to all other claims because of the pecuniary needs and requirements of the municipality. The right to such priority belongs solely to the State or municipality."

Nor do we think that a State statute can override the Act of Congress even if a lien exists for the rent, for a landlord's priority can only be over those claims not specified in the Bankrupt Act as being of even higher right, since the order of distribution prescribed by the act must be followed. This was held in: In *re* Consumers' Coffee Co. 151 Fed. 933.

Section 64 (a) is, in fact, an enactment by Congress of a long established practice in all courts of equity. The principle is thus enunciated in 2 Cooley, on Taxation, 3rd Ed., p. 834:

> "The court having in its charge or under its control a fund or other property upon which taxes are due will, as a representative of the sovereignty, direct them to be paid without raising any question of the means of enforcement by process and before all other claims excepting judicial costs. Thus, upon proper application and suitable proof, a receiver will be ordered to satisfy a tax assessed against the property in his hands and a like direction will be made in other cases where funds are held subject to the order of a court."

This principle is affirmed by Chief Justice Fuller in the case of in *re* Tyler 149 U. S. 184, where he quotes with approval from *Greeley* v. *Provident Savings Bank*, 98 Mo. 458-460:

"The amount of the taxes was undisputed and the receiver had in his hands sufficient funds to pay them and we think the order should have been made. It may be conceded that the State would not have an express lien upon the assets that entered the hands of the receiver but it had a right paramount to other creditors to be paid out of those assets * * * a right which it could have enforced through its revenue officer by the summary process of distress * * * but for the fact that the property and assets of its debtor had passed into the custody of its courts, whose duty it was in the administration and distribution of those assets to respect that paramount right, upon the untrammelled assertion of which depends the power to protect the very fund being distributed and to maintain the existence of the tribunal engaged in distributing it; and to make no order for the *distribution* of assets in *custodia legis* except in subordination to that right. The ordinary revenue officers of the State being deprived of the ordinary means of securing the States' revenue from the fund in the custody of the court, the duty devolved upon the court to be satisfied and upon the receiver to see that the taxes due the State were paid before the estate was *distributed* to other creditors: and we can conceive of no scheme of administration that the court could properly adopt by which the State's demand could be reduced to the level of an ordinary debt and be cut off unless presented to the court for allowance within a given time."

The fact that the property is in the custody of the court "does not," says Chief Justice Fuller, "involve interruption in the payment of taxes or the displacement or impairment of hte lien therefor, but on the contrary it makes it the imperative duty of the court to recognize as paramount and enforce with promptness and vigor the just claims of the authorities for the prescribed contributions to State and municipal revenue."

These principles are recognized and approved by Whittle, J., in the case of *Taylor* v. *Sutherlin-Meade Co.*, 107 Va. 797 holding: "It is the universal rule that a court as the representative of the sovereignty of the State will make no order

for the distribution of funds in *custodia legis* until provision is made for payment of taxes and levies due to the Commonwealth and its municipalities." Citing Alderson on Receivers, 205; *Bank* v. *Ewing C. C. A.*, 103 Fed. 168, and other cases. Indeed, in Virginia, we have a Statute—Pollard's Code, Sec. 492 (b), Acts of Assembly, 1897-98, p. 824, which provides as follows:

> "No decree or order shall be entered by any court of the Commonwealth directing the payment, *distribution or other distribution* of any funds, securities, monies or other property under its control, or under the control, or in the hands of any receiver, commissioner or other officer of the court, or any executor, administrator, trustee or other fiduciary, unless it shall be made to appear to such court that all taxes and levies upon such funds, securities, monies or other property have been paid, or unless the payment thereof be provided for in such decree or order, and no commissioner, executor, administrator, trustee or other fiduciary, receiver, trustee or bank, or other person or corporation shall pay out any funds in hand under the order of any court unless a receipt for the taxes is produced, showing said taxes to have been paid, or unless such order shall so state'.'

See also Acts of Assembly 1910, p. 96, Ch. 65. This Act of Assembly is similar to the Act of Congress Rev. Stat. U. S., Sec. 3466, which requires that debts due to the United States shall be first satisfied, or, more strictly, to the provision in the Bankrupt Act of 1867, which gives priority of payment to all debts due to the United States and all taxes and assessments under the laws thereof, or to the State in which the proceedings were pending. It is apparent, therefore, that originally as a rule of equity, just as an equitable supply lien was allowed priority over mortgage and other lien creditors, so taxes due the sovereign were allowed priority, and that this rule has now been crystalized into a statutory requirement applicable to all courts. It is our contention that Section 64 (a) of the Bankrupt Act intends to enact and does enact this principle into the provisions of the Bankrupt Law,

and we think that this contention has been affirmed by the Supreme Court of the United States in the case of *New Jersey v. Anderson*, 203 U. S. 483, as well as in other cases that will be cited. In the Anderson case, Mr. Justice Day, p. 489, makes the following significant remarks:

> "It is to be noted that there is a very significant difference in this respect in the Act of 1898, from the provisions in the Bankrupt Act of 1867. * * * the act of 1867 gives priority of payment to all debts due to the United States and all taxes and assessments under the laws thereof, all debts due to the State in which the proceedings in bankruptcy were pending and all taxes and assessments made under the laws of such State * * * the requirement of the present law is a wide departure from the act of 1867, and specifically obliges the trustee to pay all taxes legally due and owing without distinction between the United States and the State, county, district or municipality."

It follows, therefore, that unless the construction of section 64 (a) contended for be sound, the United States itself must be postponed as to its taxes to the claim of a landlord under similar circumstances. This would be a violent departure from the principles heretofore accepted and heretofore adopted in all Bankruptcy Acts. The Anderson case further holds the well rocegnized proposition that taxes are not debts but are imposts levied for the support of the government. It likewise holds that the language of the act is very broad and includes all taxes. As a consequence, it was held that the franchise tax imposed by New Jersey upon the bankrupt corporation which, although chartered in New Jersey, had no assets in that State and no business therein, but did its business and had its assets in the State of Illinois, was none the less to be paid as a prior claim by the Bankrupt Court, even though to do so might "take away from the local creditors in the State where the property of the corporation is situated, practically all the assets of the corporation in favor of the State where the corporation is organized, but has no business or property. And it is urged that to permit a State

under such circumstances to have a preference in the payment of taxes, would give to it an advantage which it could not otherwise obtain for want of charge or lien upon the property * * * the question is: is the claim a tax legally due and owing to the State of New Jersey?" It was held that it was a tax legally due and owing to the State and must be paid, notwithstanding the insistence that "the amount claimed for the year 1903 had not accrued at the time of the adjudication in bankruptcy, which was on April 23, 1903, the return being made on May 2, 1903," and the court said:

> "The annual return required to be made to the board on or before the first Tuesday in May is upon the basis of the capital stock issued and outstanding the first of January preceding the making of the return. The Bankrupt Act requires the payment of all taxes legally due and owing. Certainly, the tax thus assessed upon that basis was legally due and owing, although not collectible until after the adjudication. It follows that the State need not have a lien for its taxes and yet must be given preferential payment of them under the Bankrupt Act, even though to do so exhausts the assets of the bankrupt."

Since it was held in *Swartz* v. *Hammer*, 194 U. S. 441, that property in the hands of a trustee in bankruptcy is not exempted from liability to State taxation by the Bankrupt Act, and that the Bankrupt Court must pay taxes assessed against the property in its hands "together with accrued penalties and fees provided by law," it follows, from the Anderson case, that the taxes for 1910—$37.63—must be paid in the case at bar. Indeed it was conceded in argument that this was so. It likewise follows, although it was not conceded, that the taxes for 1909—$294—must be paid in the case at bar, because, at the time of the receivership—November 3-4, 1909—and at the time of the petition in bankruptcy—November 6, 1909—the taxes for 1909 were current taxes still outstanding in the hands of the Collector of Taxes and might have been paid at any time prior to January 1, 1910, without

having become delinquent. The taxes of 1908 must also be paid because, at the time of the receivership and petition, they were in the hands of the Collector of Delinquent Taxes, whose duty it was to collect the same by distress. This is also true of the taxes of 1907, for it will appear that the right and power of the City of Richmond to distrain for taxes which are legally due and owing is unlimited.

Many other cases may be cited. Among them we note *Waco* v. *Bryan*, 127 Fed. 80 (C. C. A.), which held:

> "64 (a) is perfectly plain and seems to admit of very little, if any, construction. It is contended that it is inequitable to compel payment by priority of taxes levied on property which does not come into the hands of trustees. To this it is sufficient answer to say that the priority to be given is within the control of the lawmaker and is fixed absolutely by statute, which cannot be varied to meet what equity and good conscience may require. From the foundation of the Government it has been the policy of the United States to exact priority in favor of the United States in all cases of insolvency * * * U. S. Rev. State., Sec. 3466 * * * the sovereign cannot be hindered or embarrassed or postponed in the collection of its revenues. This policy was recognized in all bankrupt laws heretofore passed—Section 62 of the Act of April 4, 1900; Section 5 of the Act of August 19, 1941; Section 28 of the Act of March 3, 1867. The present Act gives priority for all taxes legally due and owing * * * in advance of dividends to creditors. In other words, it puts taxes due the State and City on the same footing as taxes due the United States."

See also *Dayton* v. *Standard*, U. S. Supreme Ct., Rptr., Vol. 36, No. 16, p. 695.

To the same effect is *Hecox* v. *Teller*, 198 Fed. 636, in which it is said:

> "In the Circuit Court of Appeals of the Fifth Circuit, it was held in *Waco* v. *Bryan*, 127 Fed. 79-62, C. C. A., 79—that the taxes must be paid from the bankrupt estate, although they are a lien upon the real estate, which did not come into the hands of the

trustee. And the Circuit Court of Appeals of the Sixth Circuit in *Chattanooga* v. *Hill*, 137 Fed. 600—71 C. C. A., 584—held that the taxes must be ordered paid independently of whether they were secured by lien or not."

Continuing, the court said:

"The bankrupt might have paid all taxes immediately prior to the filing of the petition against him. This would not have been a preference. The law means that the trustee is to do what the bankrupt might have done and what good citizenship required him to do."

We also cite the following cases, approved by the Supreme Court in *Swartz* v. *Hammer*, 194 U. S., *Supra*.

Re Conheim, 100 Fed. 268.
Re Keller, 109 Fed. 131.
Re Sims, 118 Fed. 356.

We also cite:

Re Prince and Walter, 131 Fed. 546, held: "Taxes as a class are thus put at the head of everything."

Cooper Grocery Co. v. *Bryan*, C. C. A., Tex., 127 Fed. 815.

Re Fisher, 148 Fed. 907.

Re Stalker, 123 Fed. 961.

Re Kallak, 147 Fed. 276, held: "Section 64 (a) and Section 17 clearly show the intent of Congress that public revenues should not be prejudiced by the Bankrupt Act. This is clear that estates in *custodia legis* are taxable by the State and municipality."

Re Tilden, 91 Fed. 500, held: "This paragraph—Section 64 (a)—is a manifest recognition by Congress of the proposition that, whether any other creditors be paid or not, the Government—National, State or Municipal—is to have its taxes out of the estate."

Re Weissman, 178 Fed. 155.

Re Consumers' Coffee Co., 151 Fed. 933.

Re Tebo, 101 Fed. 419, held: "The costs and expenses of administering an estate in bankruptcy and wages due to workmen, etc., must be paid before there

is any distribution to creditors and, although there are specific liens on the estate sufficient to absorb it all, they must be postponed to such costs, expenses and wages.

Re Hilberg, 6 A. B. R., 714, held: Taxes legally due and owing by the bankrupt at the time of adjudication are a prior claim and must be paid before the secured creditors."

Re Industrial Cold Storage Co., 163 Fed. 390.

Re Cramond, 145 Fed. 966, held: "Liens actually existing at the time of adjudication are first to be paid, excepting taxes."

Loveland on Bankruptcy, 3rd Ed., Sec. 267 (a), p. 769.

It will be observed that the language of section 64 (a) is that the taxes are to be paid priod to "dividends to creditors." There can be no controversy over their priority to unsecured creditors but it is claimed by petitioners that, having secured a lien by a distress levy prior to the petition and adjudication, they are entitled to be paid in full in preference to the taxes, upon the theory that they do not get a dividend and that dividends are only paid to unsecured creditors. That this is erroneous has been held in the cases of *re* Muhlhauser, 9 A. B., 81 and *re* Barber, 97 Fed. 547. In the last named case the meaning of the word "dividend" is discussed at length and it is said:

> "The dispute is as to the proper construction of the word 'dividend.' Objecting creditors insist that a dividend, within the meaning of the law, is declared and paid only on unsecured claims—citing in re Fort Wayne Electric Corporation 94 Fed. 109, while the referee urges that all monies paid upon any claims of creditors which have been voluntarily submitted by holders for payment by and through the administration of the estate in the courts of bankruptcy are paid as dividends. Dividend is a business term applied to a division among stock holders of a fund arising from profits or to the division among creditors of an insolvent of the fund arising from the assets of the insolvent's estate. In either case, it is the fund that is divided and the part so allotted is a dividend. Divi-

dends upon profits may be at one rate to preferred stock holders and at another to common stockholders. So, in insolvency, a creditor having a priority may be paid in full; yet it is as certainly his dividend or portion of the fund as is the small percentage of his claim which the general creditor may receive from the same fund * * * Section 64 strengthens the conclusion. It provides that taxes are to be paid in advance of dividends to creditors. This excludes taxes from dividends, but nothing else. Payment of debts having priority are made to creditors from the fund arising out of the assets, to each his proper dividend. Such payments are put on the dividend sheets which he must deliver to the trustee under Clause 1, Section 39. Section 57 (1) is as applicable to priority claims as to claims of any other kind and supports this construction of 'dividend.' The misconstruction seems to have arisen from a mistaken idea that dividends, instead of relating to a division of the fund according to the rights of creditors of whatever class, has some fanciful relation to such debts as are not to be paid in full.

"Section 65 (a) usually referred to in support of this idea does not purport to cover all dividends and the other sub-divisions of Section 65 are applicable only to that same general class of creditors as dividends to priority creditors are fully covered by Section 64.

"That the word 'dividend' had in the Act of 1867, the meaning here claimed for it is very obvious. Rev. Stat. U. S. Sec. 5101-5102. Had Congress intended to change it, that intention would have been plainly expressed.

Besides, the actual language of Section 65 (a) points to this construction. The language is to the effect that equal dividends shall be paid on all allowed claims "excepting such as have priority or are secured." This plainly means that the dividends paid to priority or secured claims are not equal but are in accordance with their several amounts. It is tantamount to saying equal dividends must be paid on all allowed claims, excepting that dividends to priority and secured claims must correspond with their amounts. Were this not so, in a case in which by fortunate or skilful management every claim

was to be paid in full, there would be no dividend, because in such a case the dividends would not be equal but would correspond to the amounts of the several claims. See also 5 Cyc. 387.

One of the cases relied on by petitioners in the court below, is the case of *New Jersey* v. *Lovell*, Trustees, 179 Fed. 321. The case does not decide any point involved in the case at bar. It expressly refuses to determine whether 64 (a) prefers taxes to creditors asserting liens—the point here involved—though it may be said to express the opinion as a *dictum* that taxes are to be paid ahead of creditors without liens. The point actually decided, however, is that costs of administration are to be paid ahead of taxes, and the reasons given by the court for deciding this point are significant and potential in upholding the construction of 64 (a) here contended for. They are that, if taxes were given precedence to such costs, they might "absorb the whole fund and leave unpaid the agency by which its payment was effected. Whether it be right to prefer costs to taxes or not, the reasoning reaches much further and, if the non-payment of the agency of administration justifies a construction paying costs before creditors, for much stronger reason will it justify a construction paying taxes due the sovereign, without which the court itself could not exist, before creditors. By this reasoning a creditor, whether a lien creditor or not, must yield to the costs of the court and, for a greater reason, should yield to the taxes—without which the court could not exist.

It will be observed that taxes existing prior to adjudication are legally due and owing on the day of assessment although not payable until after the adjudication. *New Jersey* v. *Anderson*, 203 U. S. 483—*Re* Flynn 134 Fed. 145.

That the construction of Section 64 (a) here contended for is correct is still more evident when it is considered that taxes are not debts and that the United States, State and City, are not creditors under the bankrupt law. They need not be proved and tax claimants have no voice in the selection of the trustee. *Re* Cleanfast Hosiery Co. 4 A. B. R. 702; *Re* Fisher 17 A. B. R. 704; *Swartz* v. *Hammer* (C. C. A., 8th

Circuit), 56 C. C. A. 92, affirmed 194 U. S. 91—*re* Kallak 147 Fed. 276. In this last case it was expressly held:

> "Public taxes do not constitute a claim in bankruptcy. It is not necessary for public authorities to appear in a court of bankruptcy as ordinary claimants. They have no right in the administration as creditors and no voice in the selection of the trustee and the liability for taxes is in no way affected by the discharge. On the other hand, it is the duty of the trustee to ascertain from the public records the amount due for taxes and report to the court and thereupon it is the duty of the court to order payment if there are sufficient funds for that purpose."

This being so, the necessities of the sovereign demanded that the Bankrupt Act should expressly provide for its taxes and the act does so in section 64 (a), nor is the priority thus given taxes inequitable for, as it was held in the case of county of *Yuba* v. *Adams*, 7 Cal. 3537, which case was cited and quoted from with approval by Chief Justice Fuller in the case of *re* Tyler 149, U. S., *supra*.

> "The levy of the tax giving to the intervenor a judgment and lien on the property assessed having the force and effect of an execution, it might be enforced in the same manner as other executions * * * this lien was not divested by the subsequent proceedings but the fund, being in the custody of the law, was not liable to seizure and the proper remedy was by direct application to the court for the fund in its possession.

After making this quotation, Chief Justice Fuller, in 149 U. S. 185, continues:

> "If such be the ordinary rule in the State courts, it is quite apparent that it is the only one that can be properly applied where property is in the custody of the courts of the United States."

As a consequence, it follows that the bankrupt court takes the property subject to a claim for taxes, which has the force and effect of a judgment and lien enforceable by distress and

dating from the date of the assessment. It would be inequitable to ignore such a claim, nor does the fact that taxes are legally due and owing for several years affect the status of the State's claim for, as we have seen in the case of *re* Weissman 178 Fed. 115, the laches of the tax collector cannot be made a defence to the claim of the State. See also *re* Conheim 100 Fed. 268, cited with approval in *Swartz* v. *Hammer*, 194 U. S., *Supra*. In this connection we cite the case of *State* v. *Rowse*, 49 Mo. 486, in which a packet company had for several years neglected to pay taxes and made an assignment, and the court held:

> "It is admitted that the State has no express lien by statute on personal property, but is not the obligation to pay taxes of such an important character as to make the claim of the State upon the property of the tax debtor paramount to that of other creditors? By the common law all debts due the Crown were preferred to private claims. So far as taxes are concerned, every court requires that this rule be rigidly observed. Liability for them is not an ordinary one and cannot be likened to a common debt. Their collection is vital to the enforcement of the law and the very existence of the government and I know of no authority that places the obligation to pay them upon a level with liabilities upon contract. If the claim of the State were an ordinary one, as of an individual, the authorities cited show its priority was lost by the assignment, but the obligation to pay taxes can never be so considered, although there may be no express statute provision upon the subject."

This reasoning is exactly in point, as between the contract debt for rent and the claim for taxes. On this point we cite also *Re* Tilden 91 Fed. 500; *Re* Weissman 178 Fed. 115, and other cases previously cited. It may be noted that the landlord's claim for rent is placed by the schedule under Section 64 (b) 5; where it was placed by the decisions in the cases of *Re* Bishop 153 Fed. 304; *Re* Byrne 97 Fed. 762, and *Re* Tebo 101 Fed. 419, and the truth would seem to be that the act preserves the lien creditors as against the bankrupt

and all other creditors, but, being mere contract debts, it makes them inferior to those owing to the sovereign as contributions for the support of the government. A final consideration in support of our contention, is found in the language of Section 64 (b) which provides that debts shall have priority and be paid in full, with the significant language added: "except as herein provided." Since section 64 (b) contains nothing more after this statement than the bare enumeration of the five sub-divisions in their order of payment, what can be meant by the words "except as herein provided?" These words are a direct reference to the provisions of subdivision 64 (a). That is to say, the act tells us in terms that it does contain a provision which over-rides the priority and order of payment prescribed by 64 (b). This was expressly held in the case of *Re* Halsey, 175 Fed. 825 and it is impossible to understand how 64 (b) can be appealed to as prescribing the order of priority and 64 (a) ignored. In conclusion of this discussion, the admission by the petitioners that the taxes of 1910 should be paid, is a destruction of their argument against the payment of the taxes of the preceding years. Aside from the fact that the tax of 1909 was the tax of the current year at the time of the receivership and petition in bankruptcy, there is no dispute that all of the taxes are legally due and owing and it would seem that if the property in the hands of the court is subject to taxation by the municipality—of which there can be no question—and that such taxes must be paid in preference to the landlord's claim for rent—which is also beyond question—it must follow that the same reasoning requires payment of all taxes legally due and owing. *New Jersey* v. *Anderson*, 203 U. S., *Supra*, *Re* Weissman; *Re* Conheim, and *Swartz* v. *Hammer*, already cited in this brief.

This leads us to the second head of this discussion and it will be claimed that this court must follow the decision of the State court in the case of *Jackson Coal Co.* v. *Phillips Line*, 114 Va. 50. It is, therefore, insisted at once in reply that this case cannot be held as controlling the decision in the case at bar. It might be pertinent if this were a claim

by the State or by the City of Petersburg, but, whatever may be true of the Charter powers of the City of Petersburg, the limitation noted in the decision is not true of the Charter of the City of Richmond. It is significant that an examination of the record in that case shows that no brief was filed or appearance made on behalf of either the City of Petersburg or the State. It was held that the lien on the property was lost to the City and State after the date which terminated their right to distrain for the taxes in controversy and the court said that the State lost this right after the lapse of one year from the day on which the taxes were assessed. It declared that the City of Petersburg lost the right to distrain when its taxes were returned delinquent. Waiving for the present the question of the State's right to distrain, although the statute cited by the court (V. C., Sec. 623), says one year after the date fixed for the final settlement of the Treasurer with the Auditor of the State—and not one year after the assessment—and, although the decision seems in direct conflict with the opinion of Whittle, J., in *Taylor* v. *Sutherlin-Meade*, 107 Va. 797, as well as with the Statute (V. C., Sec. 492 (b)), it is very certain that the City of Richmond does not lose its right to distrain when its taxes are returned delinquent, as is said to be true of Petersburg.

The City Charter, Section 73, provides:

> "All goods and chattels wheresoever found may be distrained and sold for taxes assessed and due thereon and no deed of trust or mortgage upon goods and chattels shall prevent the same being distrained and sold for taxes assessed against the grantor in such deed, while such goods and chattels remain in the grantor's possession, nor shall any such deed prevent the goods and chattels conveyed from being distrained and sold for taxes assessed thereon, no matter in whose possession they may be found."

It may be noted here that Section 622 of the Code gives a similar right to the State to distrain for its taxes upon the goods and chattels of the delinquent "in the hands of any person." Section 51 of the City Charter also provides:

"It shall be the duty of the said collector (of taxes) on the first Monday in February of each year, to turn over to the Auditor of the City, all bills, assessments and accounts for all preceding years, upon which there shall then remain unpaid any part of any tax or assessment due the City and thereupon the City Auditor shall turn over the same to the officer of the City, who shall be chosen by the City Council and known as the collector of delinquent taxes * * * the said collector of delinquent taxes shall have the same power to collect by the same means and processes all bills, assessments and accounts delivered to him as are conferred by the City Charter upon the Collector of Taxes."

In conformity with these Charter sections, Chapter 16, Richmond City Code, 1910, and especially sections 6, 7, 8, 10, 11, 20 and 22, which are in all essential respects identical with the same sections of Chapter 14, Richmond City Code, 1899, excepting for an amendment to Section 11, were enacted vesting the Collector of Taxes with power to distrain. These ordinance provisions, so far as pertinent, are as follows:

"(6) The collector shall proceed to collect all of the taxes assessed * * * as long as the same are allowed by the City Charter and by the ordinances of the City to remain in his hands for collection."

"(7) If all taxes with which any person * * * is assessed be not paid before the 1st day of September, the collector shall distrain, except where one-half thereof has been paid, under the third section (this third section requires the payment of all or one-half of the taxes assessed on or before the 30th day of June of each year, and unless one-half be so paid a penalty of five per cent. is added to the whole tax. The remaining half or the whole tax with penalty, must be paid on or before the 31st day of December)."

"(8) Any goods or chattels in the City belonging to the person or estate assessed with taxes may be distrained therefor.

"(10) No deed of trust or mortgage upon goods or chattels shall prevent the same from being distrained or sold for taxes assessed against the grantor

in such deed whilst such goods and chattels remain in the grantor's possession, nor shall such deed prevent the goods and chattels conveyed from being distrained and sold for taxes assessed thereon, no matter in whose possession they may be found." (City Code, 1899).

"(11) Where the collector or the collector of delinquent taxes, as the case may be, cannot find sufficient goods or chattels to distrain for taxes, any person indebted to or having in his hands estate of the party assessed with such taxes may be applied to for payment thereof out of such debt or estate and a payment by such person of the said taxes, either in whole or in part, shall entitle him to a charge or credit for so much on account of such debt or estate against the party so assessed. If the person applied to do not pay so much as it may seem to the officer ought to be recovered on account of the debt or estate in his hands, the officer shall * * * procure from the Police Justice a summons * * * and from the time of the service of any such summons the said taxes shall constitute a lien on the debt so due from such person or on the said estate in his hands." (City Code, 1899).

"(20) If there be good cause to believe that a person assessed with taxes not owning real estate intends to remove his property out of the City or to sell out or close his business therein, the collector may, unless such taxes be paid on demand, distrain therefor, although the first day of September may not have arrived and although one-half thereof may have been paid.

"(22) * * * It shall be the duty of the said collector * * * on the first Monday in February of each year, to turn over to the Auditor of the City, all bills, assesments and accounts for all preceding years, upon which there shall then remain unpaid any part of any tax or assessment due the City and thereupon the said Auditor shall turn over the same to the collector of delinquent taxes, who shall proceed to collect the same * * * and who shall have the same power to collect by the same methods and processes, all tax bills, assessments and accounts delivered to him as are conferred by the Charter and the ordinances of the City upon the Collector of the City taxes."

It is plain, therefore, that the right to distrain given by Sections 51 and 73 of the Charter, and by the ordinances cited, contain no time limit and that the collector of delinquent taxes has precisely the same power to distrain as the collector of taxes has. If, therefore, it be true that the right to distrain for taxes in the City of Petersburg is lost after they are returned delinquent, as stated by Judge Cardwell, in the Phillips Line case, then this case is not controlling so far as the City of Richmond is concerned, because there is no such loss of the right to distrain and, if the loss of the right to distrain by the City and State is the reason for the loss of the tax lien, as stated by that decision, it follows that the City of Richmond, which has not lost its right to distrain, has not lost its lien. It follows, too, that the City has a lien for its taxes prior to the actual levy of the distress to enforce it, for the court so holds, else it could not be lost. The right of the City of Richmond to distrain for its taxes given by the Charter sections mentioned has no express limitations and is, therefore, unlimited on this point.

The case at bar is similar to the case of *Powell's executor* v. *Richmond*, 94 Va. 79, in which it was contended that the City was limited to a period of five years within which to enforce its tax lien on real estate, because the State was so limited by V. C., 636, but Keith, President, held that the city had a lien without limitation on the time of its enforcement, under its Charter, section 75, which simply gives the right to a lien without any express limitation. *Nullum tempus occurit regi* is a familiar principle protecting public rights and extends to cities; 3 Dillon Municipal Corporations, Sec. 1194, p. 1902. Being for the enforcement of a public right rather than the recovery of a debt, the collection of taxes is not barred by any statute of limitations unless expressly so provided by law; 28 Cyc., 1304; 37 Cyc. 1147; Cooley on Taxation, 2nd Ed., p. 448; *Powell's executor* v. *Richmond*, 94 Va., *supra*. It follows, we think, that the City of Richmond has an unlimited right to distrain and a well recognized lien on personal property for taxes from the date of

their assessment until paid or, at least, until the goods and chattels pass into the hands of an innocent purchaser for value. This leads us to a consideration of the status and rights of the landlord. It is said in 5 Cyc. 328: "Claims for rent due at the time of the filing of the petition in bankruptcy are provable, but the landlord cannot prove a claim against the bankrupt for rent which would accrue subsequent to the date of adjudication." As was held in *re* Jefferson, 93 Fed. 948: "The Bankrupt Act dissolves all the contracts of the bankrupt and the one with the landlord is no more sacred than the others." In this case it was also held that a State statute providing, in case of a levy under an execution or attachment, that a year's rent to accrue shall be paid out of the proceeds as a prior claim is not applicable to cases in bankruptcy. The relation of landlord and tenant must of necessity cease—*Bray* v. *Cobb*, 100 Fed. 270. In the case at bar, therefore, the relation ceased with the filing of the petition, on November 6, 1909, or, certainly, at the adjudication, on February 3, 1910. In fact, it was actually terminated by the receivership on November 3, 1909. The landlord's right to distrain is given by Sections 2791 and 2792, of the Code of Virginia. Under the former a distress may be levied on any goods of the lessee or his assignee, or under tenant found on the premises, or which have been removed therefrom not more than thirty days, but it is expressly provided by Section 2792 that "neither this nor the preceding section shall affect any lien for taxes, levies or militia fines." It follows, therefore, that the right to distrain is expressly subordinated to the lien for taxes and levies and this fact is again made manifest by Section 9, Chapter 16, Richmond City Code, 1910, and Chapter 14, Richmond City Code, 1899, which provides that taxes may be collected by distraint from a tenant and that the latter shall have credit for the same against the landlord out of the rents due him. It is manifest that Section 2792, of the Code of Virginia, providing that the right to distrain for rent shall not affect any lien for taxes, does not mean that there is no lien for taxes until after a distress levy therefor, for the levy gives actual possession which could

not be interfered with by subsequent distress. It is further manifest that Section 2792, refers to the inchoate lien for taxes prior to the actual levy and is a declaration of the fact that there is such a lien which, as we have seen, attaches as of the day of the assessment. Were this not so, then a landlord might defeat the City of its current taxes by a levy at any time prior to September 1st of any year, and might also defeat the State, whose right to distrain begins on the 15th day of June in each year, as provided by V. C., 604. In fact, therefore, both the landlord and the State and City are given inchoate liens for their claims and both are allowed to distrain, but the landlord is expressly subordinated to the City and State, nor was it necessary for the City to perfect its lien by a levy in order for it to be preserved in this Court. *Swartz* v. *Hammer*, 194 U. S., *Supra.* Whether the landlord's levy within four months of adjudication is discharged by Section 67 (f) of the Act is a question upon which the Courts are divided, *re* Richards 37 C. C. A. 634; *re* Doherty, 109 Fed. 480; *re* Belknap, 129 Fed. 646; *re* Consumers' Coffee Co., 151 Fed. 241; Collier on Bankruptcy, 8th Ed., 744—but whatever may be true of the distress lien, it cannot be denied that the attachment lien was obtained through legal proceedings and is discharged by Section 67 (f) of the Bankrupt Act: *Barksdale* v. *Hendree*, 2 Patt. & H., 43; *Delaplain* v. *Armstrong*, 21 W. Va. 211; *Pennsylvania R. R. Co.* v. *Rogers*, 52 W. Va. 450.

Under Section 51 of the Charter and Section 22 Ch. 16, of the Ordinances, the tax of 1907 was not returned delinquent until February 1, 1908, nor the tax of 1908, until February 1, 1909, nor the tax of 1909 until February 1, 1910. The Collector of City taxes might have distrained in each year after September 1st and until February 1st, of the succeeding year—that is until the beginning of the next fiscal year. On February 1st, of each year, the delinquent taxes of the preceding year were turned over to the Collector of Delinquent Taxes for collection by the same means and processes, *i. e.*, by distress, etc., without limitation as to time. The delinquent's goods and chattels, therefore, are never free

from the inchoate lien or from a liability of its being perfected by distress. They were then subject to this lien when the landlord levied on November 1, 1909, and when the receivership began on November 4, 1909, and the adjudication was had on February 3, 1910. Indeed, the 1909 tax was not even delinquent when receivers were appointed and was binding, as the tax of the current year, on assets in the hands of the receivers along with the taxes for 1910 and 1907 and 1908, and as we have seen the landlord's lien under 2791 and 2792 and his attachment under 2962 cannot affect the lien for taxes. Nor do the provisions of Charter section 72 affect the result. It says the collector may be vested with all the power of a sheriff as collector of State taxes. The Charter was approved May 24, 1870, and prior to that time the sheriff collected State taxes. But the power to do so after 1870 was taken from sheriffs and vested in the treasurers, nor have any powers been given sheriffs since.

Under the acts prior to that time the course of collection was as follows, as appears from the Code, 1860. A copy of the books made up by the Commissioner of the Revenue, was delivered to the sheriff, who began his collections as of July 1st, and he had the right to distrain after that day.

By section 5, any goods or chattels of the person assessed in the county or corporation could be distrained, and the sheriff was given two years within which to distrain. He made a final settlement with the Auditor before the first day of May of the year after the assessment, that is to say, since the assessments were as of February 1st—fifteen months thereafter—Ch. 35, Secs. 61 and 64, and Ch. 36, Secs. 1, 4, 5, 14, 17 and 19, 1860 Code. If the Auditor got the delinquent list before May 1st, he credited the sheriff with its amount and delivered it to any sheriff or collector of any county or corporation for collection, to be returned within a year thereafter.

Under Chapter 35, Sec. 88, the Auditor charged the sheriff with the whole amount of the taxes, shown on the books made up by the commissioner and certified to by the clerk of the court, and the sheriff had to square the money and the de-

linquents with the book. His delinquent list had to be made up as soon as practicable after October 1st, in each year (Ch. 36, Sec. 14), and had to be in the Auditor's hands within fifteen months after the assessment, if he was to be credited with the amounts shown on them. His power to distrain, therefore, so far as its fruits could show on his accounts, lasted from July 1st to October 1st—a period of three months —but for his benefit he was given two years within which to collect by distress. Meantime, he had settled with the Auditor and the collections by distress made by him between October 1st and the end of the two years went to reimburse him for the settlement already made with the Auditor on the basis of his lists of October 1st. Of course, such belated distress proceedings could only have been for taxes he failed to return as delinquent and had been called upon to pay. As to those returned delinquent and credited, his power to collect and to distrain ended on May 1st, if not on October 1st, preceding. But that did not mean that the State had lost the power of distress, for Ch. 36, Sec. 20, expressly required the Auditor to place the delinquent list in the hands of any Sheriff or Collector of any county or corporation, and *he* was allowed a year thereafter in which to collect the tax returned delinquent, and, by the same process of distress and the like. (Ch. 36, Sec. 4). The State's right to distrain did not end even there, for Ch. 36, Secs. 25 and 26, authorized the Auditor at any time and as often as he pleased, to appoint a Collector in any county or corporation to collect arrears of taxes and to allow him a reasonable time within which to do so. That these collections might be by distress appears from the express provision of Ch. 36, Sec. 4.

The State's right to distrain was, therefore, without limit and the limitation was altogether on the time granted the officer within which to recoup for losses incurred in the settlement made with the Auditor on May 1st, of the year after assessment, by reason of error in failing to return delinquents as delinquent or on account of a failure to have them credited as delinquents. It was not a limitation on the State. It was hardly a limitation on the officer who, by the way,

might have lost his office, but it was a gratuity to the officer extending his powers for his own benefit to a stipulated time.

Exactly the same course of procedure was continued as to Treasurers in the place of Sheriffs, by the Code of 1873. From Ch. 46, Secs. 21 and 22, and Ch. 37, Secs. 2, 3, 12, 15 and 18, it appears that the Treasurer received taxes from February 1st to December 1st, when 5 per cent. was added and they were handed over to the Collectors of the townships, who had two years within which to distrain on any goods and chattels in the county or corporation belonging to the person assessed. He made out his delinquent list on February 1st (twelve months after the assessment), having had the right to distrain only since the preceding December 1st (two months). The list was sent to the Auditor and if received before the first day of April next, after the taxes were assessed, the Treasurer was credited with the amount—that is to say, his final settlement was made fourteen months after the taxes reached him on the basis of lists made up twelve months after the taxes came to him, and yet his power to distrain lasted two years. But the Auditor had the same duty as before, to place the delinquent lists in the hands of any Treasurer or Collector for collection, to be returned within a year (Ch. 37, Sec. 18), and by Secs. 21 and 22, he was given the same power to appoint, whenever and as often as he pleased, collectors to collect arrears of taxes—and in both cases by distress, as provided by Sec. 2.

The same course is prescribed by the laws in force since Pollard's Code of 1904. By Ch. 27, Sec. 603, the Treasurer collects from July 1st to December 1st, when he adds 5 per cent. penalty. After December 1st, he levies a distress warrant, and by section 604, on December 1st, he makes affidavit to the Auditor within fifteen days of all State taxes collected and pays the amount into the Treasury. On or before June 15th, the Treasurer makes his final settlement with the Auditor, showing collections, insolvents and delinquents. By 605, he makes out his lists, one of them delinquents, not later than July 1st of each year, which are sent to the Auditor as before. (Sec. 608). By Sec. 610 the Auditor credits the Treasurer

with the amount of taxes shown on the delinquent and erroneous lists if received within three months next after his final settlement—that is, within nineteen and one-half months after the assessment—thereby allowing the Treasurer ten months within which to distrain for the benefit of the State. But he has that right nine months longer for his own benefit, *i. e.*, for a year from his final settlement on June 15th. The Auditor, within sixty days after receiving the delinquent lists, places them in the hands of any Sheriff, Sergeant, Constable or Collector, except the officer returning them, for collection, to be accounted for within one year after the list is placed in his hands. The Section 612 expressly gives such officer power to distrain.

By Section 619, the Auditor may, whenever and as often as pleases, appoint a collector in any county or city to collect taxes and levies on persons and property therein returned delinquent—such collector to have a reasonable time—and by Section 622, any goods or chattels of the delinquent in the county, etc., may be distrained by the Collector.

Section 623 gives *the treasurer* the right to distrain for taxes, etc., "*for which he has accounted* to the auditor of public accounts and the county authorities, respectively, at any time within one year after" the time fixed for his final settlement with the auditor—that is to say one year from June 15th and twenty-eight and one-half months after the assessment. Of this year the results of only three months' work could go to the State and the work of the remaining time would be for the personal benefit of the treasurer. As stated above, this is plainly a favor granted the treasurer to enable him to recoup for erroneous payments made in his final account. It limits the favor to the treasurer, but does not limit the State.

It follows from what has been said that there are several remarkable things to be said about the decision of Cardwell J. in *Jackson Coal Co.* v. *Phillips Line*, 114 Va. 49-50:

1*st.* Neither the State nor city filed briefs or were represented.

2*nd*. The decision says V. C. 623 gave the *State* a right to levy, whereas it only gives a personal right to the *treasurer* to do so.

3*rd*. The decision says V. C. 623 gave the State a right to levy for *one year from the date on which taxes in her favor were assessed*, whereas the section gives the treasurer that right for one year from *the date fixed for his final settlement with the auditor*, and the final settlement is had on June 15th, which is sixteen and one-half months after the assessment.

4*th*. The decision construes a section (623) intended to be a personal privilege of the treasurer and an extension in time of his powers of distress—a privilege that is wholly for the treasurer's personal benefit—into a limitation upon the power of the State to collect its revenue.

5*th*. The decision wholly ignores the extensive powers of the auditor and the collector under Section 612 and loses sight entirely of the continuing and unlimited power of the auditor and possible collectors under Sections 619, 620 and 622.

6*th*. The decision ignores the history of the State's power to distrain for taxes under the statutes and is forgetful of the universal rule and of the Statute V. C. Sec. 492 (b) that courts having a fund in *custodia legis* will, as the representative of the sovereign, make no order for distribution of the fund to creditors without providing for the sovereign's revenues—as was held by Whittle J. in *Taylor* v. *Sutherlin-Meade Co.*, 107 Va. 797, and re Tyler, 149 P. S. 164.

7*th*. As applied to the case at bar the decision would ignore the limitation put on the landlord's power of distraint as against the State's lien for taxes by V. C. 2791-2792.

8*th*. It would ignore the provisions of the Richmond Charter under which the collector, having been charged by the auditor with all of the taxes extended on the books by the commissioner, makes final settlement with the auditor on February 1st on which day his power of distress ended after having lasted for five months and on that day the delinquent list is given to the collector for delinquent taxes for collection with the same powers and by the same means and processes

(distress) and they remain in his hands until collected. Charter Sec. 51.

The collector of delinquent taxes, therefore, corresponds to the special State collectors appointed by the auditor under V. C. 619, except that his office and duties and powers are permanent.

We think we have clearly established the following points:

1. The city's right to distrain is paramount to that of the landlord. V. C. 2791-2792 and 2962.

2. The lien of the city arising out of this right is identical in character with the landlord's lien, though superior to it, and, if the landlord's levy within four months was valid as merely perfecting a pre-existing lien, it is valid only as against other contract creditors, for the city had at the time of the levy an equally valid and a superior lien.

3. There is no limitation in time on the right of the State or city to collect taxes by distress and the lien arising out of that right is continuous.

4. The decision in the Phillips Line case to the contrary construes a favor with a time limit granted to the treasurer into a limitation upon the power of the State and, whether erroneous or not, is not a controlling decision as to the city of Richmond for there is no such limitation as to it as is said to exist in the case of Petersburg.

5. Section 64 (a) of the Bankrupt Act enacts into law the long established and universal rule that courts, as representatives of the sovereign, will make no order for the distribution of a fund in *custodia legis* without providing for taxes due the sovereign. It places the city and State upon the same footing, without distinction, as the United States and the United States courts must act in questions of State and city taxes as they would act if the tax were due the United States. *Waco* v. *Bryan*, *C. C. A.* 127 Fed. 80; *New Jersey* v. *Anderson*, 203 U. S. 489. Section 64 (a) intends to give taxes priority in distribution over all mere contract creditors whether with or without liens and it is immaterial whether the State or city has a lien or not, for the act controls.

(203 U. S. 490). Nor can this priority be lost by the laches of the collectors for the act applies to "*all taxes legally due and owing.*" *Re* Conheim 100 Fed. 268; *Re* Weissman 178 Fed. 115.

6. In the case at bar, regardless of other reasons, the tax of 1910 should be paid because assessed after the receivership and before the adjudication. *Re* Tyler 149 U. S. 184. So, the tax of 1909 should be paid because it was due and owing when the receivers took charge and did not become delinquent until long afterwards. Meantime, the collector and the delinquent collector were prevented from distraining by the receivership and adjudication and the levy of the landlord could not affect the tax lien. As to the tax of 1907 and 1908, the goods and chattels were liable to distress by the collector of delinquent taxes, notwithstanding the landlord's levy (V. C. 2792) and are given priority over him by 64 (a).

7. The only alternative to the construction of Section 64 (a) here urged is that stated by the defendants: "*taxes are relegated to the extreme rear* save as to general creditors alone," and this, we submit, is violative of public policy and of the policy of all previous bankrupt acts since it must apply to the United States as well as to the individual States.

And, finally, we deny that the landlords have any right to saddle the city with responsibility for their own act in permitting the tenant to fall into arrears of rent. The city had just as much right to assume that the landlords were collecting their rent as they had to assume the collection of taxes. Indeed, the non-payment of the tax was a fact of public record, whereas the arrears of rent were secret and unknowable. If anybody is to suffer for the indulgence shown the tenant it ought, in equity to be the landlord whose indulgence was knowable only by himself and his tenant. It is, therefore, insisted by the respondent that even under the State law it was given a lien for the taxes in question for, as was held in the case of *Hardy, Trustee, et als.* v. *Norfolk Manufacturing Co.*, 80 Va. 418: "A lien is a hold or claim which one person has upon the property of another as a security for some debt or charge." Nothing could be more certain than that a city is given a hold or claim upon the property of a citizen for the

tax charged against him, and, under the terms of the law applicable to the taxes of the City of Richmond, there is no limit to its powers to enforce this claim by seizure of the property of the tax debtor. That the tax lien was superior to all other liens has been so often decided that we simply refer to *Stevenson* v. *Henkle*, 100 Va. 598, and the cases there cited which, although relating to the tax lien on real estate, are applicable to any other tax lien. Since, therefore, the taxes were due as of February 1st of each year, the lien for them likewise dates from that day and cannot be disturbed by the landlord or any other creditor. V. C. Sec. 2792—Bankrupt Act Sec. 64 (a).

Respectfully submitted,

GEORGE WAYNE ANDERSON,

Assistant City Attorney.

BRIEF FOR THE RESPONDENTS

SUPREME COURT OF THE UNITED STATES

No. 195

THE CITY OF RICHMOND, A MUNICIPAL CORPORATION, Petitioner,

vs.

ELIZABETH W. BIRD, LOULIE W. MOLTENO, AND CHARLES E. WHITLOCK, Executors, Respondents.

On a Petition for a Writ of Certiorari to the Circuit Court of Appeals for the Fourth Circuit.

SAMUEL A. ANDERSON,
Attorney for Respondents.

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IN THE

SUPREME COURT OF THE UNITED STATES

THE CITY OF RICHMOND, A MUNICIPAL CORPORATION, PETITIONER,

versus

ELIZABETH W. BIRD, LOULIE W. NOLTING, AND CHARLES E. WHITLOCK, RESPONDENTS.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF FOR THE RESPONDENTS.

When this case was before the District Court of the United States for the Eastern District of Virginia, the City of Richmond vigorously contended, under section 67 (f) of the bankruptcy act, that the respondents were not entitled to a lien by virtue of their distress warrant for the reason that the same was levied within four months of the filing of the petition in bankruptcy. Now, however, the petitioner has abandoned this contention (petitioner's brief, page 2), and there remain but two questions upon which your Honors are called to pass judgment: 1st. Is there anything in the bankruptcy act which displaces the *lien* of respondents in favor of the

claim for delinquent taxes on the part of petitioner? 2nd. Under the laws and decisions of the Commonwealth of Virginia, is petitioner entitled to priority over a lien creditor notwithstanding the fact that it took no steps to perfect the lien it might have acquired if it had exercised the right of distraint bestowed upon it by its charter? These two questions will be taken up and discussed in order with the confident assurance that each of them will be answered in the negative.

1st. *Does the bankruptcy act displace a valid Lien in Favor of a Claim for delinquent Taxes, for which the Petitioner might have levied a Distress Warrant, but did not?*

Section 67 (d) of the bankruptcy act is as follows:

> "Liens given or accepted in good faith and not in contemplation of or in fraud upon this act, and for a present consideration, which have been recorded according to law, if record thereof was necessary in order to impart notice, shall not be affected by this act."

It is needless to remind your Honors that distress for rent is one of the most ancient remedies known to the law, and that it is recognized practically throughout the English speaking world, the modern statutes on the subject being merely declaratory of the common law right which has existed in England for centuries. Hence it would seem that Congress, in the enactment of section 67 (d) must have had in mind as being excluded from the operation of the act the lien acquired under distraint for rent as well as other liens. As a matter of fact the right of lien, inchoate but nevertheless actual, is given by the execution of the lease itself, and from the commencement of the tenancy the landlord is clothed with summary power to perfect the lien by levy whenever default shall occur in the payment of the rent. This

was decided *in re Smith & Robinson,* 154 Fed. 343, where in the course of his opinion, Judge Grosscup said:

> "Under the lease . . . . the right of lien was created when the lease was executed and the tenant entered upon possession of the premises—a right put wholly, at that time, within the control of the landlord and maturing the moment the landlord chose to mature it. And though it did not actually attach until within four months of the bankruptcy, it was the kind of lien, it seems to us, that section 67-d was intended to preserve; for unquestionably as between the parties to the lease it was a lien, not simply because the distress warrant was actually levied, but because, by contract between them, the levy of the distress warrant was authorized."

See also: *in re Westside Paper Co.,* 162 Fed. 110, and *in re Burns,* 175 Fed. 633.

It is true that, in the cases just cited, the Circuit Courts of Appeal were dealing with the question whether or not the landlords' liens were affected by section 67 (f) of the bankruptcy act, but the principle was established that such liens were embraced within the purview of section 67 (d) and hence were not "affected by this act", whether it be section 67 (f) or some other action. To the same effect is *in re Emslie,* 42 C. C. A. 350, where it was held that a mechanics lien was protected under the provision of section 67 (d).

If, therefore, section 67 (d) does apply to the lien under a distress warrant for rent, it must follow that no other provision in the bankruptcy act—certainly no other provision by mere implication—can override the admitted lien of respondents, and consequently no federal question is presented by this record. But the learned and accomplished attorney for the petitioner has insisted with so much earnestness that, under section 64 (a) of the act, petitioner is entitled to priority over a lien creditor, that we feel obliged to point out the fal-

lacy of his argument and to demonstrate that no conflict exists between the two provisions. In this undertaking we shall assume that it is unnecessary to cite authority for the proposition that one of the elementary canons of statutory construction is that all portions of a statute must be given effect if possible and that, in case of apparent conflict, the statute must be so construed as to make an harmonious whole. We do not concede that there is any conflict between the two sections in question, but would merely observe in passing that the contention of petitioner, were it upheld, would result in irreconcilable conflict.

Section 64 (a) is as follows:

> "The court shall order the trustee to pay all taxes legally due and owing by the bankrupt to the United States, State, county, district, or municipality in advance of the payment of dividends to creditors, and upon filing the receipts of the proper public officers for such payment he shall be credited with the amount thereof, and in case any question arises as to the amount or legality of such tax the same shall be heard and determined by the court."

This section, we submit, shows conclusively upon its face that it had no reference to lien creditors. The direction to the trustee is to pay the taxes "in advance of the payment of dividends to creditors," which, in the nature of things, refers not to lien creditors but to general creditors who are the only kind entitled to *dividends* from a bankrupt's estate. In a labored effort to support his theory that taxes are to be paid ahead of lien debts, counsel for petitioner attempts on page 21 of his brief, to show that the word "dividends" is applicable alike to lien creditors and general creditors, and cites two cases, from one of which he quotes at length. The first one, *in re Mulhauser*, 9 A. B. R. 81, is the opinion of a referee who was interested in the result and who undertook to

controvert the decision *in re Utt* (C. C. A.), 5 A. B. R. 383. The other case *in re Barber,* 97 Fed. 847, was criticized and overruled in the Utt case, from which we quote, commencing on page 387:

> "The point in dispute is: What is the meaning of 'dividends' as the word is used in these provisions? The question has been considered in a number of cases by the District Courts. *In re Ft. Wayne Electric Corporation,* 94 Fed. 109; *In re Fielding,* 96 Fed. 800; *In re Barber,* 97 Fed. 547; *In re Sabine,* 1 Am. B. R. 321. We agree with the conclusion declared in the first two of these cases that sums to be paid upon secured claims and other claims entitled to priority of payment are not 'dividends' upon which the trustee or referee may receive a commission. This is made clear by other provisions of the statute . . . . Section 65 (a) declares that dividends of an equal per centum shall be declared and paid on all allowed claims, except such as have priority or are secured . . . The opinion in the Barber case, *supra,* recognizes this construction, but makes a distinction against secured creditors who invoke the action of the bankruptcy court and through the action of that court alone have their security converted into a fund in the hands of the trustee . . . . We find no warrant for the distinction in the terms of the statute."

Not only, then, is it manifest from a consideration of section 64 (a) taken by itself that Congress had reference to unsecured creditors alone when it declared that taxes should be paid in advance of dividends to them, but the assurance is made doubly sure when section 64 (b) is taken into account. That section fixes the status of debts entitled to priority and provides that they shall be paid in full out of the bankrupt's estate in the following order:

(1) Costs of preserving the estate; (2) filing fees in involuntary cases; (3) costs of administration; (4)

wages due workmen, clerks, &c.; (5) debts entitled to priority by the laws of any State or the United States.

In *New Jersey* v. *Lovell*, 179 Fed. 321, the point directly in issue was whether the State's claim for taxes should take precedence over the cost of preserving the bankrupt's estate after the filing of the petition. The decision contains an illuminating discussion of the legislative intent as expressed in the two sub-sections, and concludes as follows: "It suffices to say that on the question that is before us, namely, whether the taxes of a State are, under clause (a) given priority over the actual and necessary cost of preserving the estate subsequent to the filing of the petition, we are clear they are not." From this decision the State of New Jersey presented a petition for a writ of *certiorari*, which was refused by your Honors. (55 L. Ed. 347.)

In *Mills* v. *Virginia-Carolina Lumber Co.*, 164 Fed. 168, a creditor whose debt was secured by deed of trust was sought to be charged with the payment of the costs of administration, but the Court declared they did not see how, apart from the mere costs incident to the proof of his claim, the security of this creditor could be reduced by making the fund arising from the specific property on which his debt was secured liable for the costs of the general administration of the bankrupt's estate.

Since, therefore, under *New Jersey* v. *Lovell* the costs of administration take precedence over taxes, and under *Mills* v. *Virginia-Carolina Lumber Co.*, lien creditors take precedence over costs of administration, the proposition is axiomatic that lien creditors take precedence over taxes.

The following additional cases are directly in point:

In re Kirby-Dennis Company, 2 A. B. R. 402;
In re Williams Estate, 84 C. C. A. 434;
In re Yoke Vitrified Brick Company, 180 Fed. 235;

In re Zahner, 193 Fed. 769;
The Bethulia, 200 Fed. 879;
In re Howard, 207 Fed. 402.

The chief reliance to maintain the contrary of the principles decided in the foregoing cases is placed by counsel for petitioner in the case of *New Jersey* v. *Anderson,* 203 U. S. 483. An examination of that case, however, discloses the fact that the sole question involved was whether the *license fee* imposed upon corporations was a "tax" within the purview of section 64 (a). The majority opinion held the affirmative and declared such license fees to be entitled to *"preferential payment"*. The dissenting opinion took the ground that the claim of New Jersey should not be given *priority,* but should be placed upon the same footing with the *claims* of other creditors. These expressions make it plain that the contest of the State was not with lien creditors but with general creditors, and hence the case is no authority one way or the other.

On page 17 of his brief, counsel quotes from the opinion of Mr. Justice Day to the effect that the requirement of the present law relative to taxes is a wide departure from the act of 1867 in that it makes no distinction between taxes due the United States and those due the States and their political sub-divisions, from which counsel presents to your Honors the direful result which would ensue unless the construction of 64 (a) contended for by him be upheld, namely, that the United States itself must be postponed as to its taxes to the claim of a landlord under similar circumstances! To which we reply that Congress has seen fit to do this very thing. Granted the landlords in this case have a valid lien, we insist that 67 (d) expressly declares this lien shall not be affected by the provisions of the act, and this unequivocal declaration must be respected by the courts. Suppose, for instance, that A. is the owner of a hand-

some residence covered by a mortgage and that he is also the possessor of a large income upon which the United States has assessed an income tax. Before this tax is collected, A. is adjudicated a bankrupt and his trustee in bankruptcy converts his assets into money and finds the funds insufficient to discharge the mortgage and pay the income tax. Clearly, under section 67 (d), the mortgage must be first paid in full. And if a mortgage creditor, why not a landlord under a valid distress warrant? Moreover, if the United States had been in a position to collect the tax or to acquire a lien, but had lost its remedy through the neglect of the Collector, there would have remained to the Government a plain and adequate remedy upon his official bond, just as there is in the case at bar.

A number of other cases are cited by counsel for petitioner which, upon analysis, fall far short of sustaining his contention. It would unduly prolong this brief to discuss the entire mass. We shall confine our attention to a few only, disposing of the others with the statement that we have critically examined each of them, and that, with a single exception, not one is in point. On the contrary, many of them will be found to be in our favor.

Thus, in *Murray's Lessee* v. *Hoboken Land Co.*, 18 How. 272-282, a portion of a sentence is quoted, to-wit, "Imperative necessity has forced a distinction between such claims (taxes) and all others." The case itself was an action of ejectment against the purchaser at a marshal's sale under a distress warrant levied on property of a customs collector who was in default, and the contention was that the seizure and sale of the property under such summary proceeding was without due process of law, to which the Court replied: "Imperative necessity has forced a distinction between such claims and all others, which has sometimes been carried out by sum-

mary methods of proceeding, and sometimes by systems of fines and penalties; but always in some way observed and yielded to". And so it was this same "imperative necessity" which caused the General Assembly of Virginia to write into the charter of the City of Richmond the authority to levy upon the citizen who was in default in the payment of his personal taxes, and petitioner has only to thank the carelessness and inefficiency of its own chosen officials for the failure to avail itself of a remedy as summary and drastic as the wit of man can devise. Verily, the learned counsel must have been hard pressed to cite this case as authority for the proposition that Congress intended a *claim* for taxes to override a valid lien.

Another inept citation is the case of *Prince* v. *Walter*, 131 Fed. 546, in which counsel has adhered to his habit of quoting a single sentence without regard to the context, namely, "Taxes as a class are put ahead of everything." In this case the trustee realized a fund from the sale of the bankrupts' personalty and another fund for the sale of their realty. The Court said it was clear that, so far as the realty was concerned, the taxes were not entitled to payment, the sale being made subject to a first mortgage and the proceeds being claimed by a second mortgagee. Referring to section 67 (d), the Court said: "This required that the money realized from the sale of property on which there are existing liens shall go to satisfy them according to their priority", and then it proceeded to hold that the taxes should be paid out of the personal fund, adding the expression quoted by the Court that taxes as a class are not ahead of everything. But having just previously decided that taxes were subordinate to liens, it is manifest that the Court was not referring to them in its sweeping declaration.

In re Weissman, 178 Fed. 115, involved the question whether or not taxes should have priority over all the

classes embraced in 64 (b), and clearly is not authority in a case where the rights of a lien creditor are involved.

Bank v. *Ewing*, 103 Fed. 168, was a case where, under the laws of Texas, the taxes in question were a *lien* upon the railway property, and the Court held that such lien was prior to all other liens except judicial costs.

In re Stalker, 123 Fed. 961, was a case where no lien creditors were before the Court, and the same thing is true of *Hecox & Teller*, 198 Fed. 636.

In *Waco* v. *Bryan*, 127 Fed. 80, the opinion shows that the taxes in question were assessed against and were a lien upon real estate which had been sold under execution prior to the institution of the bankruptcy proceedings, and the Court ordered the payment of these taxes out of funds which would otherwise have been applicable for distribution among the general creditors.

In re Keller, 109 Fed. 131, involved the question whether taxes assessed but not due should be given priority over general creditors.

In re Kallak, 147 Fed. 276, is merely another case in which the Court upheld the payment of taxes "before anything shall be paid to creditors by way of dividends", i. e., before distribution to general creditors.

This disposes of all the cases on the subject cited by counsel in the new portion of his brief (meaning that portion written after the decision by the C. C. A.), except the case of *Chattanooga* v. *Hill*, 71 C. C. A. 584. That case was commented on in the case of *Halsey*, 175 Fed. 825, which contains an elaborate discussion of the question of priority as between taxes and the cost of preserving the bankrupt's estate, and reaches the conclusion that Congress has by apt words signified its intention to make taxes subordinate to the payment of the cost of preserving and administering the bankrupt's estate. In commenting upon *Chattanooga* v. *Hill*, the Court said that the question involved related to the ap-

portionment of taxes between properties mortgaged and unmortgaged, adding that Judge (Justice) Lurton, although referring to Judge Archibald's opinion *in re Prince & Walter,* did not give it his approval, and concluding: "In truth his reasoning suggests the query whether such taxes were prior to administration expenses."

Counsel for petitioner, in his brief before the Circuit Court of Appeals, with great industry and assiduity, has collected a mass of authorities on the scope and effect of section 64 (a), but, as previously stated there is only a single case having a direct bearing on this controversy, *in re Heilberg,* 6 A. B. R. 714, a District Court decision which does hold that taxes take priority over liens. This case, we submit, is out of harmony with the spirit of the act, is in direct conflict with section 67 (d), and is out of line with the overwhelming weight of authority.

Great stress is laid in petitioner's brief upon the necessity that the sovereign should collect its taxes. We readily admit such necessity and further admit that Congress, in the enactment of section 64 (a), intended that all taxes legally due and payable should have a measure of preference out of a bankrupt's estate, but we confidently insist that there is no manifestation of an intention to give taxes priority over the debts due to lien creditors. Such intent would naturally have been expressed in plain and explicit language, most probably by way of an addendum to section 67 (d).

As was said in *New Jersey* v. *Lovell,* 179 Fed. 321:

> "Tax collectors whose powers to distrain lapsed when the estate passed into the custody of the law, or who were left to come in as *general creditors* (italics supplied), were subjected to trying delays. Obviously sub-division (a) meant that this delay should not occur, and therefore provided that, in advance of payment of dividends to creditors, the

Court shall order the trustee to pay all taxes legally due and owing by the bankrupt."

This is the natural and logical construction of the section in question, and we would not have consumed so much of the time of the Court, had not our opponent contended otherwise with so much apparent seriousness and earnestness.

2nd. *Under the State Laws, including the Charter of the City of Richmond, is Petitioner entitled to Priority over a Lienor in the Absence of a Levy which its Charter authorized?*

The General Assembly of Virginia has plainly and clearly pointed the way by which petitioner could have collected the taxes due it in the most plenary manner. We quote from section 73 of the Charter of the City of Richmond as follows:

"All goods and chattels wheresoever found may be distrained and sold for taxes assessed and due thereon, and no deed of trust or mortgage upon goods or chattels shall prevent the same from being distrained and sold for taxes assessed against the grantor in such deed while such goods and chattels remain in the grantor's possession, nor shall any such deed prevent the goods and chattels from being distrained and sold for taxes assessed thereon, no matter in whose possession they may be found."

In pursuance of the authority thus vested in it, the Council of Richmond, section 7, chapter 14, City Code 1899, adopted an ordinance requiring the collector of taxes to distrain if the taxes be not paid before the first day of September in each year. The taxes in litigation were those assessed against the bankrupt for the year 1907, 1908, and 1909. The adjudication in bankruptcy occurred in February, 1910, while the levy of respondent's distress warrant was made November 1, 1909.

Thus it appears that petitioner could have distrained for its 1907 taxes any time between September 1, 1907, and November 1, 1909; for its 1908 taxes any time between September 1, 1908, and November 1, 1909; and for its 1909 taxes any time between September 1, 1909, and November 1, 1909.

In *Marye, Auditor,* v. *Diggs,* 98 Va. 749, the question arose as to whether the Commonwealth and the County of Patrick could maintain an equity suit to subject real estate to the statutory lien for taxes. The following appears in the syllabus:

> "Taxes can only be assessed, levied and collected in the mode pointed out by statute. When the State or a county has assessed or levied a tax, they are severally clothed with power to take the personalty by distress, and the realty by sale, for taxes in the most summary manner. And although it be expressly declared that the tax should be a lien on the property assessed, neither the State nor the county can maintain an independent suit in chancery to enforce such lien."

Judge Keith, in an elaborate opinion, which lucidly discussed the Virginia tax laws, quoted liberally from *Board of Education* v. *Old Dominion &c.,* 18 W. Va. 445, and from *State* v. *B. & O. R. R. Co.,* 41 W. Va. 81 (which he said, for obvious reasons, were entitled to great weight), and from other authorities, and proceeded on page 755:

> "The citizen must come into Court and obtain a judgment before he can have execution against the property of his debtor. He must have a decree before he can sell the land of his debtor to discharge a lien upon it by judgment, but the State, when she has levied and assessed the tax, is clothed, *ipso facto* with the power to take the personalty by distress and the realty by sale for taxes, after the most summary proceeding. What more can she need? What

> necessity exists for the power to sue? In the language of the Court just quoted: 'What more drastic remedy can the wit of man devise?' When the property of the citizen is not appropriated to the payment of taxes assessed against him, *the failure is due, not to the insufficiencies of the remedies provided by law, but to the neglect and inefficiency of those whose duty it is to enforce them.*" (Italics supplied.)

This case is controlling authority on the proposition that the Commonwealth and its political sub-divisions must strictly pursue the statutory remedies given them for the collection of their revenues and that a departure from or failure to follow such statutory remedies will result in the loss of those revenues, and also on the proposition, controverted at length by counsel for petitioner, that in Virginia at least the sovereign may lose its remedy through the laches of its officials.

In *Board of Education* v. *Old Dominion, etc.*, 18 W. Va. 445, the Court said in part:

> "It would follow, therefore, that taxes are not a lien upon lands unless made so by express language of the statute or by fair implication from the statutory language . . . .
>
> It would seem necessarily to follow, that though a municipal tax was expressly declared by statute to be a lien, yet if a specific mode be provided, whereby the land may be sold to satisfy such a lien, no suit could be brought in a court of equity to enforce such a lien; for the foregoing decisions show that the specific statutory mode of collection must be pursued; and other cases lead to the same conclusion."

This language, slightly paraphrased, is, in our judgment, conclusive of the question under consideration. Your Honors might well say: Taxes are not a lien upon personal property unless made so by express language of the statute or by fair implication from the statutory

language. When a municipal statute (in this case, section 73 of the Charter of the City of Richmond), provides that all goods and chattels, wheresoever found, may be distrained and sold for taxes assessed and due thereon, no lien on such goods and chattels can be acquired unless and until the distress is actually made. The specific statutory mode of collection must be pursued.

The Virginia Court, in *Marye* v. *Diggs, supra,* discussing the right of the State in some jurisdictions to maintain a suit to enforce a lien for taxes *where no means are provided by law for collecting the tax,* said that there is no such defect in our laws as would warrant courts in the assumption of jurisdiction for the purpose, and continued:

> "As is well said by the Supreme Court of West Virginia in *State* v. *Railroad, supra,* where this whole subject is fully and ably discussed, and the conclusion reached that the courts have no jurisdiction to entertain suits for the collection of taxes: 'The absence of remedies in the two States (Virginia and West Virginia) through all their history is easily explained. The remedies given by statutes were better, more speedy, and efficacious. These were the sale of land for taxes and distress of personalty, without exemption. Why fill the courts with suits, burden the State with endless delays of litigation, and burden the citizen with costs? If a railroad company defaults in payment of taxes, every wheel upon its tracks may be stayed, every particle of its movable property be taken, and its power to earn revenue taken away. What more drastic remedy can the wit of man devise? It is urged that the statute commands the railroad company to pay, and this begets obligation, and therefore action lies. Grant there is obligation, and it can be enforced; but the same statute points out the means of enforcement, and excludes a suit!"

It must follow from this cogent reasoning that not even the State has a lien upon *personalty* for taxes as-

sessed thereon unless she does what the statute authorizes her to do, make a levy. The statute "points out the means of enforcement" and excludes inaction and neglect and inefficiency. And so the City of Richmond has, by its charter, been given a remedy for the collection of personal taxes as drastic as the wit of man can devise. If its sworn officers sit idly by and see its rights fritted away, the courts are powerless to intervene.

The very question was squarely presented and squarely decided in the case of *Jackson Coal Co.* v. *Phillips Line,* 114 Va. 40. The Hustings Court of Petersburg gave the State and the City of Petersburg priority for delinquent taxes over lien as well as general creditors of the insolvent steamship line, for which receivers had been appointed in January, 1910. In reversing this decree, the Supreme Court said on page 49:

> "With respect to that part of the decree appealed from, which directed the payment of taxes due from the Phillips Line, and its predecessor in title, to the State of Virginia and the City of Petersburg, out of the fund under the control of the Court, and giving the taxes priority of payment over the creditors of the receivers, the court erred, except as to the taxes for the year 1910. The property upon which these taxes were assessed was wholly personal, and no effort appears to have been made, certainly as to the years prior to 1910, either by the Auditor of the State or by the City of Petersburg to collect the taxes until the property was placed in the hands of the receivers in this cause and an account of debts against the Phillips Line ordered. The State had a right, under sections 604-623 of the Code, for one year from the date on which the taxes in her favor were assessed to levy upon the property assessed with the taxes, which right was not exercised; and it appears that the City of Petersburg had a right of distress against the property assessed with taxes in its favor, which the City might have exercised before the taxes were return-

ed delinquent, or the property upon which they were assessed had passed into the hands of subsequent purchasers, and thereby secured a lien therefor, but these rights were never exercised.

Under these circumstances, neither the State nor the City had a lien upon the property of the Phillips Line when it went into the hands of the receivers for the taxes due them, respectively, and, therefore, the position of the State and City was no better than that of the general creditors of the company, and they were not entitled to share in the proceeds of sale of the company's property, except as to the amount of taxes due them (the State and City), respectively, for the year 1910, assessed against the receivers."

We deem ourselves fortunate in being able to present to your Honors a case so directly in point and so absolutely controlling upon the question at issue. The only difference between the situation of the City of Petersburg there and of the City of Richmond here is that apparently Petersburg's right to distrain expired when the taxes were returned delinquent while there seems to be no such limitation, in point of time, upon Richmond's right, a fact which but serves to emphasize the carelessness and inefficiency of the officers entrusted with the collection of the latter's taxes. The main point is that the Court held positively and emphatically that neither the State nor the City of Petersburg had exercised the statutory authority conferred upon them respectively and that consequently neither of them had a lien for taxes when the property of the Phillips Line went into the hands of the receivers, and, of course, could acquire no such lien thereafter.

It would seem, however, under this decision, that the taxes for the year 1910 were assessed against the receivers and that no opportunity to levy for that year had been lost through neglect and delay, in consequence of which the Court directed the payment of the 1910 taxes;

and so in this case, we do not see how the City was in any wise in default as to the 1910 taxes and we have very frankly said so heretofore, an admission on our part from which the distinguished Attorney for the City speciously seeks to draw the conclusion that the landlord's lien is subordinate to *all* the rights of the City. This is an absolute *non sequitur* and is based upon an utter misconception of the purposes of the Act of Assembly of March 3rd, 1898, Acts 1897-8, p. 824, which provides:

> "That no decree or order shall be entered by any court of the Commonwealth directing the payment, distribution, or other distribution of any funds, securities, moneys, or other property under its control, or under the control or in the hands of any receiver, commissioner, or other officer of the court or any fiduciary, until all taxes and levies upon such funds, securities, moneys, or other property are paid, unless the payment thereof be provided for in such decree or order . . . ."

In the nature of things this statute means no more than its express language declares, namely, that taxes assessed upon funds and property *in the hands of any receiver or other officer* shall be paid in advance of distribution. In this case the taxes for the years 1907, 1908 and 1909 were assessed upon property in the hands of the Ainslie Carriage Company, the subsequent bankrupt, and only the taxes for the year 1910, amounting to $37.63, were assessed upon property in the hands of the receivers, just as was so in the Phillips Line case. The statute itself is merely declaratory of the law as stated by Mr. Chief Justice Fuller *in re Tyler*, 149 U. S. 184, so strongly relied upon by counsel for petitioner, and also in *Greeley* vs. *Providence Savings Bank*, 98 Mo. 485, cited in the Tyler case and quoted from at length in petitioner's brief. An examination of this case shows that the court placed the State ahead of general creditors alone, and

that the rights of lien creditors were not affected, while in *Yuba* vs. *Adams,* 7 Cal. 35, it is apparent that the County of Yuba had a *lien* for its taxes, which the court held was not divested by the subsequent proceedings, but that the fund, being *in custodia legis,* was not liable to seizure, and that the proper remedy was by application to the court.

Another case strongly relied on by counsel is that of *Taylor* vs. *Sutherlin-Meade Co.,* 107 Va. 787, where the court quashed an attachment in equity because of a faulty affidavit. In discussing the claim of the City of Lynchburg for personal taxes for the year 1904 due by a New Jersey corporation which had been put into the hands of a receiver in that State, the court held that taxes should be paid before the fund under its control was distributed, adding that it would be an anomalous result if either the attaching creditor or the foreign receiver could invoke the jurisdiction of the courts to take charge of and administer the assets of an insolvent and *thereby* prevent the levying for its taxes, at the same time denying the power of the court to discharge the taxes out of the fund. No question was there involved of the payment of delinquent taxes for which the City had had an opportunity to distrain. If so, the court would never have stated that the appointment of the ancillary receiver had prevented the levy. What the court did state was that, on the application of the foreign receiver and the attaching creditors, the property of the insolvent was held *in custodia legis* and, therefore, without fault of the sovereign, no levy could be made. The court had already quashed the attachment and decided that the attaching creditors were not lienors, and hence the question involved in the case in hand did not arise in that case.

Counsel for petitioner seeks to differentiate the decision in *Jackson* vs. *Phillips Line, supra,* upon the ground that there is no limitation in point of time to

the right of Richmond to distrain for its taxes, whereas Petersburg's right in this respect expired when the taxes were returned delinquent, and seeks to belittle the decision on the ground that no appearance was made in the appellate court on behalf of the Commonwealth or the City of Petersburg. To the first contention, we reply that the ground of decision was that, by neglect or laches, neither the Commonwealth nor the City of Petersburg had acquired a lien upon the property of the insolvent when it went into the hands of the receiver, that their *status as general creditors* became fixed as of that time; and to the second we suggest that the legal advisers of the Commonwealth and of the City most probably recognized the hopelessness of sustaining the decision of the lower court and the uselessness of making the attempt.

We submit with the utmost confidence that the Virginia decisions of *Marye, Auditor,* vs. *Diggs,* 98 Va. 749, and *Jackson* vs. *Phillips Line,* 114 Va. 40, are clearly right, but that, right or wrong, the questions involved are no longer *res integra,* for the reason that, by an unbroken line of decisions, your Honors have held that you have no authority to review the decisions of State courts of last resort upon questions of the construction and interpretation of local statutes.

In *Bailey* vs. *Magwire,* 22 Wall. 215, in referring to the decisions of the Supreme Court of Missouri in the case of *The Pacific Railroad Co.* vs. *Cass County,* this Court said on page 231:

> "As it is the peculiar province of the highest court of a State to decide whether or not the method pursued in the assessment and collection of taxes is in conformity with the law of the State, this decision is controlling."

And to the same effect are, among numerous others, the following:

Games v. *Stiles*, 14 Peters 322.
Taylor v. *Secor*, 92 U. S. 545.
Pullman Co. v. *Pennsylvania*, 141 U. S. 18.
Lewis v. *Monson*, 151 U. S. 545.
Shaefer v. *Werling*, 188 U. S. 516.
Brown-Forman Co. v. *Kentucky*, 217 U. S. 563.

In the very able opinion of the Circuit Court of Appeals for the Fourth Circuit the point was made that the City of Richmond lost its right of levy because, under section 73 of its charter, already set out at length in this brief, the right was limited to the levy upon the particular goods and chattels upon which the taxes in any one year were assessed. While there is abundant justification for affirming the decision upon the broader grounds which we have already discussed, we are also of opinion that this ground is clearly correct. The language of the charter provision is that: "All goods and chattels wheresoever found may be distrained and sold for taxes assessed and due thereon," and again, "nor shall any such deed (of trust) prevent the goods and chattels from being distrained and sold for taxes assessed thereon, no matter in whose possession they may be found." The plain meaning is that the goods and chattels of a taxpayer may be distrained for taxes assessed upon those particular goods and chattels, not that they may be levied on for taxes assessed upon some other goods and chattels. If there were any doubt, it would be solved by reference to that portion relative to chattels subject to a deed of trust or mortgage. The two portions of the section are identical in terms and effect, and your Honors can see at a glance that the General Assembly never intended that the holder of a chattel mortgage should have his security taken away because the mortgagor was in default in the payment of taxes upon some other property. Hence the burden rested upon petitioner to show, at least for the years 1907 and 1908, that the chattels assessed for taxation for those

years were the same chattels upon which respondents levied their distress warrant, a burden which it failed to shoulder and which it could not have shouldered, as every presumption is to the contrary.

Moreover, in declaring that no deed of trust or mortgage should prevent the goods and chattels from being levied on, the General Assembly, under familiar rules of construction, must have intended that a judgment creditor who had previously levied an execution or a landlord who had previously levied a distress warrant should have priority over a subsequent levy by the City for its taxes.

For the foregoing reasons we respectfully submit that the decision of the Circuit Court of Appeals should be affirmed.

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Attorney for Respondents.

City of Richmond had no lien for past due taxes upon these goods and chattels when the Chancery Court receiver took possession, we think must be regarded as settled by *Jackson Coal Co.* v. *Phillips Line*, 114 Virginia, 40 (1912), and this notwithstanding differences between its charter and that of Petersburg. The Supreme Court of Virginia there said (pp. 49, 50):

"With respect to that part of the decree appealed from, which directed the payment of taxes due from the Phillips Line, and its predecessor in title, to the State of Virginia and the city of Petersburg, out of the fund under the control of the court, and giving the taxes priority of payment over the creditors of the receivers, the court erred, except as to the taxes for the year 1910. The property upon which these taxes were assessed was wholly personal, and no effort appears to have been made, certainly as to the years prior to 1910, either by the Auditor of the State or by the city of Petersburg, to collect the taxes until the property was placed in the hands of the receivers in this cause and an account of debts against the Phillips Line ordered. The State had a right under sections 604–623 of the Code, for one year from the date on which the taxes in her favor were assessed, to levy upon the property assessed with the taxes, which right was not exercised; and it appears that the city of Petersburg had a right of distress against the property assessed with taxes in its favor, which the city might have exercised before the taxes were returned delinquent, or the property upon which they were assessed had passed into the hands of subsequent purchasers, and thereby secured a lien therefor, but these rights were never exercised.

"Under these circumstances, neither the State nor the city had a lien upon the property of the Phillips Line when it went into the hands of the receivers for the taxes due them, respectively, and, therefore, the position of the State and city was no better than that of the general

creditors of the company, and they were not entitled to share in the proceeds of sale of the company's property, except as to the amount of taxes due them (the State and the city), respectively, for the year 1910, assessed against and due from the receivers."

Respondents therefore must prevail unless priority over their lien is given by § 64a to claim for taxes which, under state law, occupied no better position than one held by a general creditor. Section 67d, Bankruptcy Act, quoted *supra*, declares that liens given or accepted in good faith and not in contemplation of or in fraud upon this act, shall not be affected by it. Other provisions must, of course, be construed in view of this positive one. Section 64a directs that taxes be paid in advance of dividends to creditors; and "dividend" as commonly used throughout the act means partial payment to general creditors. In § 65b, for example, the word occurs in contrast to payment of debts which have priority. And as the local laws gave no superior right to the city's unsecured claim for taxes we are unable to conclude that Congress intended by § 64a to place it ahead of valid lien holders.

New Jersey v. *Anderson*, 203 U. S. 483, is not decisive of any point here contested; it only adjudged that New Jersey's claim was for a tax within the meaning of § 64a and entitled to be treated accordingly. See *New Jersey* v. *Lovell*, 179 Fed. Rep. 321.

The judgment below must be

Affirmed.

MR. JUSTICE DAY and MR. JUSTICE CLARKE dissent.